TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 316.

THE MARYLAND DREDGING AND CONTRACTING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 26, 1916.

(24,485)

(24,485)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 310.

THE MARYLAND DREDGING AND CONTRACTING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 22, 1915.

1 In the Court of Claims.

No. 31188.

THE MARYLAND DREDGING AND CONTRACTING COMPANY, INCORPORATED,
vs.
THE UNITED STATES.

I. *History of Proceedings.*

The original petition and Exhibits were filed September 30, 1911.
On February 8, 1912 the defendants filed a demurrer to the petition.
On April 1, 1912 the demurrer was argued and submitted.
On May 27, 1912 the Court filed an opinion by Peelle, Ch. J., sustaining the demurrer and dismissing the petition, which is as follows:

2 II. *Opinion of the Court. Filed May* 27, 1912.

Peelle, Ch. J., delivered the opinion of the court:

The question for decision arises on the Government's demurrer to the petition on the ground that the facts averred are insufficient in law to constitute a cause of action.

The material averments are that the claimant, a corporation of the State of Delaware, with its principal office for the transaction of business in the city of Baltimore, Md., entered into a contract with the Government August 15, 1908, agreeing "to excavate or otherwise construct a channel 10 feet deep at mean low water from Beaufort Inlet to Pamlico Sound, N. C., through Adams and Core Creeks, N. C., and through the intervening dry land (between the heads of these creeks) along lines to be laid out by said party of the first part" of approximately 3,600,000 cubic yards, more or less, at the price of 10¾ cents per cubic yard "place measurement for all material excavated in conformity with the attached specifications," the work to be divided into two divisions (A and B.)

The work was to be commenced within 45 days from the date of the notification of the approval of the contract by the Chief of Engineers (which was September 14, 1908) and was to be completed within 18 months thereafter, or on or before March 14, 1910.

Pursuant to the terms of the contract, the claimant entered upon the performance thereof and completed the work assigned, to division A on June 25, 1910, and to division B November 15, 1910. The work so completed was accepted by the Government, and the claimant was paid therefor March 2, 1911. But in making payment the Government deducted for the aforesaid delay the sum of $7,530.50 (including $210.50 as the cost of superintendence and

inspection during the period of delay) as liquidated damages under paragraph 5 of the contract, which reads:

"It is further expressly understood and agreed that time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part to complete this contract within the time as specified and agreed upon that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible, of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated and fixed in advance, and they are hereby agreed upon, liquidated, and fixed at the sum of twenty dollars ($20) for each division for each and every day the party of the second part shall delay in the completion of this contract, and the party of the second part hereby agrees to pay to the United States as liquidated damages, and not by way of penalty, the sum of twenty dollars ($20) for each division for each and every day the party of the second part shall delay in the completion of this contract, said delay not being the fault of the party of the first part.

"It is further understood and agreed that the United States shall also have the right to recover from the party of the second part all costs of inspection and superintendence incurred by the United States during the period of delay, and also a reasonable value of any labor and materials which may be furnished by the party of the first part to the party of the second part during the time the latter is proceeding under this contract. And the party of the first part may deduct or retain all of the above-mentioned sums out of or from any money or reserved percentage that may be due or become due the party of the second part under this agreement.

"Provided, however, That if the party of the second part shall by strikes, epidemics, local or State quarantine restrictions, or by abnormal force or violence of the elements, be actually prevented from completing the work or delivering the materials at the time agreed upon in this contract, and such delay is without contributory negligence on his or their part, such additional time may, with the prior sanction of the Chief of Engineers, be allowed him or them, in writing, for such completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance or extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

The claimant's contention is, and it so avers, that the deduction as liquidated damages was illegal and unreasonable, because the delay was caused by "extraordinary and unforeseeable conditions," against which, it contends, provision was made by paragraph 16 of the specifications, which reads:

"16. The time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and

experience, unless extraordinary and unforeseeable conditions supervene."

In the prosecution of the work the claimant encountered submerged stumps, roots, branches and timbers, which it avers and contends were "extraordinary and unforeseeable conditions," thereby causing the delay for which the deduction was made.

Paragraph 22 of the specifications provides:

"22. Character of Material.—The material is believed to be soft mud, sand, clay, shell and silt. Each bidder, however, is expected to examine and decide for himself, as no allowance will be made should any of it prove to be otherwise than as stated, except that solid rock, large bowlders, and compact gravel will not have to be removed at the prices bid for ordinary excavation. If such materials should be encountered their removal, if required by the engineer, will be done under special agreement and paid for as extra work, as provided for in the form of contract to be entered into."

Under this provision the claimant was bound to examine and determine for itself the character of the materials to be excavated, and the presumption is that its bid was based on the conditions found. That it did not find the stumps, roots, branches, and timbers characterized as "a sunken or submerged forest" was no fault of the Government; and assuming that the claimant, as it was required to do, made diligent examination to ascertain the character of materials to be excavated, still its failure to find such submerged forest was in no way the fault of the Government.

Furthermore, by the last clause or sentence of paragraph 7 of the specifications it is provided that "No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work." Here in express terms the claimant was informed before making its bid that no allowance would be made for difficulties attending the execution of the work which it failed to correctly estimate.

The question therefore is whether under the contract the difficulties encountered can be held to excuse the claimant for the delay.

Paragraph 24 of the specifications provides:

"24. Clearing.—All trees growing in the area to be excavated and within 25 feet of the banks of the excavation will be removed by the contractor. The contractor shall have the right to use timber so cut in such accessory works as he may deem desirable. The channel must be cleared of all snags, logs, roots, stumps, or wreckage that project into or encroach in any way upon the cross section, as indicated in paragraph 27, the cost of same being included in the unit price bid for excavation."

Paragraph 27 of the specifications therein referred to provides:

"27. Excavation.—Dredges, or other appliances will work on lines and in positions laid out by the engineer. Care must be taken to leave a reasonably even bottom at the depth required and a close approximation to the required side slopes. The contractor will be required to go over his work, if necessary, to produce this result."

These paragraphs would seem to imply that snags, logs, roots, stumps or wreckage might be encountered, and that if they encroached in any way on the cross section they were to be cleared, "the cost of the same being included in the unit price bid for excavation."

Paragraph 22 provides the character of the materials believed to exist, but leaves it to each bidder to determine for himself, "as no allowance will be made should any of it prove to be otherwise than as stated, except that solid rock, large bowlders, and compact gravel will not have to be removed at the prices bid for ordinary excavation," and that if encountered and their removal should be required by the engineer the same "will be done under special agreement and paid for as extra work, as provided for in the form of contract to be entered into." Here provision is made against solid rock, large bowlders, and compact gravel, but nothing is said about submerged stumps, roots, branches and timbers, nor are they referred to except in paragraph 24 aforesaid.

Paragraph 16 is a mere statement for the information of bidders as to what was considered a sufficient time within which to complete the work by a contractor having the necessary plant unless hindered by "extraordinary and unforeseeable conditions." Not that such conditions, unless otherwise provided for, should operate to excuse a contractor from performance or to relieve him from the difficulties encountered in performance. If the paragraph is to be considered other than as information to bidders then it must be in connection with the proviso in paragraph 5 of the contract, which is the last expression of the parties; that is to say, such extraordinary and unforeseeable conditions as were provided against in the proviso to paragraph 5 of the contract, viz, "strikes, epidemics, local or State quarantine restrictions, or by abnormal force or violence of the elements," in which case if the claimant be without contributory negligence, "such additional time may, with the prior sanction of the Chief of Engineers, be allowed him or them, in writing, for such completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable."

To ascertain the meaning of the words "extraordinary" and "unforeseeable," as applied to conditions, it is hardly necessary to go beyond the words themselves. However, when a condition is not common, or is beyond the ordinary, lexicographers class it as "extraordinary," while an "unforeseeable" condition they class as "incapable of being foreseen." But, for the reasons already stated, the definitions do not aid the claimant, as the work was not hindered by way of any of the causes mentioned in the contract. If it had been and additional time had been allowed the deduction complained of would not have been made. The obstructions encountered were such as might, under the specifications, have been expected; but whether so or not the Government can not be charged with the loss resulting from the claimant's failure "to estimate correctly the difficulties attending the execution of the work." The difficulties encountered in performance were a part of the consideration, and hence assumed by the claimant.

It results that the deduction complained of was in accordance with the contract, and the demurrer is therefore sustained and the petition dismissed.

Howry, J., was not present when this case was tried and took no part in the decision.

6 III. *History of Further Proceedings.*

On Nov. 27, 1912 the claimant filed a motion for a new trial.

On Nov. 30, 1912 C. C. Calhoun, Esq. was substituted as attorney of record, on suggestion of the death of John Mason Brown, former attorney.

On December 30, 1913 the claimant filed its amended petition, and exhibits, which are as follows:

IV. *Amended Petition.*

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioner, the Maryland Dredging and Contracting Company for its amended petition respectfully states and represents:

I.

That it is now, and was at all of the times hereinafter mentioned and referred to, a corporation duly created and existing under and by virtue of the laws of the State of Delaware, having power and authority under and by virtue of said laws and as such corporation to sue and to be sued, and to contract and to be contracted with, that its principal offices for the transaction of business are
7 in the City of Baltimore, State of Maryland; and that it is the sole owner of the claim herein presented and sued upon, no part thereof having at any time been assigned or transferred to any other person or corporation.

II.

That under date of June 25, 1908, Capt. Earl I. Brown, Corps of Engineers, United States Army, (acting for and on behalf of the United States of America), issued and caused to be published an advertisement soliciting and inviting sealed proposals for the construction of Divisions A and B of the Inland Water-way from Pamlico Sound to Beaufort Inlet, N. C., the said advertisement reciting and stating that such sealed proposals would be received at the United States Engineer Office in the city of Wilmington, N. C., until the hour of 12 o'clock noon, July 27, 1908, and then and there publicly opened; that simultaneously with the publication and issuance of said advertisement, printed specifications for the proposed work were issued by and from the said United States Engineer Office for distribution among and for the information and guidance of prospective bidders for such work.

That thereafter, and prior to the date and hour therefor designated in said advertisement, above referred to, your petitioner did file a sealed proposal for the doing of said work, which said proposal was thereafter accepted by the United States; that subsequently, to-wit, under date of August 15, 1908, your petitioner did enter into a formal contract for the performance of said work with the said Capt. Earl I. Brown, Corps of Engineers, United States Army, (acting for and on behalf of the United States), a copy of the said contract and of the specifications and advertisement
8 forming a part thereof being attached to the original petition filed herein, marked "Claimant's Exhibit A," to which reference is made and all of which your petitioner prays may be treated and read as a part of this amended petition.

III.

That by the terms of said contract dated August 15, 1908, above mentioned, the respective parties thereto did undertake and agree as follows:

"That, in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Capt. Earl I. Brown, Corps of Engineers, United States Army, for and in behalf of the United States of America, and the said Maryland Dredging & Contracting Company, do covenant and agree, to and with each other, as follows:

"The said party of the second part agrees to excavate or otherwise construct a channel ten feet deep at mean low water from Beaufort Inlet to Pamlico Sound, N. C., through Adams and Core Creeks, N. C., and through the intervening dry land (between the heads of these creeks) along lines to be laid out by said party of the first part, of the following dimensions:

	Bottom widths.	Side slopes.
Excavation through dry land..	90 ft.	1:2½
Narrow part of rivers.....	125 ft.	1:3
Wide part of rivers.....	250 ft.	1:3

"The work to be done covers both divisions A and B, as described in paragraph 21 of the attached specifications, and contemplates the removal of 3,600,000 cubic yards, more or less, place measu-
9 rement.

"The party of the first part agrees to pay unto the party of the second part the sum of ten and three-fourths (10¾) cents per cubic yard, place measurement, for all material excavated in conformity with the attached specifications."

IV.

Your petitioner states that by the terms of article 3 of said contract of August 15, 1908, it was provided:

"That said party of the second part shall commence the work herein contracted for within forty-five days after date of notifica-

tion of approval of the contract by the Chief of Engineers, United States Army, and shall complete the same within eighteen months as set forth in paragraph 15 of the specifications."

That by the terms of paragraph 15 of the specifications just referred to it was provided as follows:

"The contractor for each division will be required to commence work under the contract within forty-five days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it within eighteen months after said date of notification."

That said contract above referred to was, as required by article 14 thereof, approved by the then Chief of Engineers of the United States Army, on September 10, 1908; that your petitioner was notified of such approval on the 14th day of September, 1908; and that it therefore became obligatory upon your petitioner to finish or complete the performance of said work on or before the 14th day of March, 1910.

10

V.

Your petitioner states that immediately upon the receipt by it of notification of approval of said contract, as above set out, and thereafter, it did faithfully and diligently prosecute to completion the work covered by and provided for in said contract of August 15, 1908; that the portion designated in the contract and specifications as Division A was completed by it on the 25th day of June, 1910, and accepted as satisfactory by the United States; that the portion of the work designated as Division B was completed on the 15th day of November, 1910, and accepted as satisfactory by the United States; that thereafter, to-wit, on the 2nd day of March, 1911, the said Capt. Earl I. Brown did make final payment to your petitioner for and on account of the work done or performed under the said contract of August 15, 1908, but in such final settlement did withhold from moneys otherwise due to your petitioner the sum of seven thousand five hundred and thirty dollars and fifty cents ($7,530.50), the said sum being alleged by him, as the agent and representative of the United States, to be and represent the total of the liquidated damages accrued and to be deducted under the terms of said contract and its component parts, together with the additional costs of superintendence and inspection alleged to have been incurred and sustained by the United States during the period of delay in the completion of said contract, as above set forth; that the amount withheld as alleged liquidated damages aggregated the sum of seven thousand three hundred and twenty dollars ($7,320.00), and that the sum withheld as the alleged additional costs of superintendence and inspection aggregated two hundred and ten dollars and fifty cents ($210.50), making the total of seven thousand five hundred and thirty dollars and fifty

11 cents ($7,530.50) above referred to; that your petitioner did at the time of said settlement or payment object and protest in writing against the said deduction or any part thereof.

VI.

That by article 5 of said contract it was provided in words and figures as follows:

"It is further expressly understood and agreed that time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part to complete this contract within the time as specified and agreed upon, that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance, and they are hereby agreed upon, liquidated, and fixed at the sum of twenty dollars ($20.00) for each division for each and every day the party of the second part shall delay in the completion of this contract, and the party of the second part hereby agrees to pay to the United States as liquidated damages, and not by way of penalty, the sum of twenty dollars ($20.00) for each division for each and every day the party of the second part shall delay in the completion of this contract, said delay not being the fault of the party of the first part.

"It is further understood and agreed that the United States shall also have the right to recover from the party of the second part all costs of inspection and superintendence incurred by the United States during the period of delay, and also a reasonable value
12 of any labor and materials which may be furnished by the party of the first part to the party of the second part during the time the latter is proceeding under this contract. And the party of the first part may deduct or retain all of the above-mentioned sums out of or from any money or reserved percentage that may be due or become due the party of the second part under this agreement.

"Provided, however, that if the party of the second part shall by strikes, epidemics, local or State quarantine restrictions, or by abnormal force or violence of the elements, be actually prevented from completing the work or delivering the materials at the time agreed upon in this contract, and such delay is without contributory negligence on his or their part, such additional time may, with the prior sanction of the Chief of Engineers, be allowed him or them, in writing, for such completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable: but such allowance or extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

That the deductions made against your petitioner, as hereinbefore set forth, were and are alleged by the United States, its officers and agents, to have accrued and to have been made and withheld under and by virtue of the above article 5 of said contract.

That by the terms of paragraphs 16 and 22 of the specifications,

forming a part of said contract of August 15, 1908, it was provided as follows:

"16. The time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital and experience, unless extraordinary and unforeseeable conditions supervene."

* * * * * * *

"22. Character of Material.—The material is believed to be soft mud, sand, clay, shell, and silt. Each bidder, however, is expected to examine and decide for himself, as no allowance will be made should any of it prove to be otherwise than as stated, except that solid rock, large bowlders, and compact gravel will not have to be removed at the prices bid for ordinary excavation. If such materials should be encountered their removal, if required by the engineer, will be done under special agreement and paid for as extra work, as provided for in the form of contract to be entered into."

VII.

The said contract contemplated the construction of a canal between Beaufort Inlet and Pamlico Sound, N. C., covering a distance of about fifteen miles, as follows: Beginning at Beaufort Harbor, or Inlet, thence, in a northerly direction, through Newport River, to Core Creek, thence along the bed of Core Creek to its head, thence, running through the dry land lying between Core Creek and Adams Creek; covering a distance of about ten miles from the beginning; thence along the bed of Adams Creek for a distance of about five miles to its mouth, or northern terminus, in Neuse River. That no exceptional or unusual difficulty was encountered in the work through Core Creek, Newport River, the dry land above mentioned, or the head waters of Adams Creek, a distance of about ten miles; and that the work thereon could and would easily, have been completed, as required by said contract, within the time specified therein but for the difficulties encountered by reason of a submerged forest lying entirely beneath the bottom of Adams Creek throughout the remaining portion of about five miles of said canal, as hereinafter described.

That said Adams Creek is in the nature of an inlet from the Neuse River and the sea, with high and low tide; that at a point about five miles from its mouth in said Neuse River, and at about the point where said submerged forest began, it has a width of over five hundred feet, which, in the course of half a mile expands to 2,300 feet; that its average width for the first mile and one-half is more than 1,200 feet, and for the balance of the three and one-half miles its width ranges from 2,000 to 3,300 feet with an average width of more than 2,500 feet. That throughout said distance of about five miles, where said submerged forest was encountered, Adams Creek was, at the time herein referred to, and is now, an open body of water, clear and free from rocks, stumps or growing trees, and at the time said contract was entered into was navigable

and, in fact, used for pleasure craft, and to some extent for commercial purposes by light draft boats and launches.

That in the construction of said channel, 250 feet in width, with a uniform depth of ten feet at mean low water, as required by said contract, your petitioner encountered at said point in Adams Creek, about five miles from its mouth, the remains of a submerged forest; that said submerged forest was encountered at a depth of about eight feet beneath the bottom of the water in said Adams Creek; and that intervening between the bottom of the water in said Creek and said submerged forest was a deposit of earth about eight feet deep, which completely covered and obscured said
15 submerged forest; that said remains of a submerged forest consisted of stumps and roots, part of a forest which at one time covered said section, and which, by and through some abnormal force and violence of the elements, became partly submerged under a body of water and the exposed and upper part of which soon decayed, while the stumps and roots, which were completely submerged by water, were preserved. That said stumps stood in an upright position, and that they and said roots were firmly and solidly imbedded in the surrounding earth. That said stumps and roots were located at such a distance apart as to make it impossible to have discovered their existence by the ordinary and customary method of inspection and examination of the proposed line of said canal, but were near enough to each other to make it impossible to do the required excavating in the ordinary and customary manner, and with the ordinary and customary machinery used for such purposes and as contemplated by said advertisement, contract and specifications.

That said submerged forest was the result of some abnormal violence of the elements and that it was such an abnormal force of the elements as to prevent, and that it did prevent, the completion of the work by the time agreed upon. That by reason of its location said submerged forest caused such extraordinary and unforeseeable conditions as to supervene in the completion of the work as to result in the delay with which the plaintiff has been charged, and for which it has been penalized, as herein described.

VIII.

That prior to the submission of its bid for the said proposed work, your petitioners, other bidders and the agents of the
16 Government exercised every known and usual precaution, and made an exhaustive and painstaking effort by means of soundings, borings, and other examinations, conducted with the utmost care and skill, for the purpose of ascertaining and familiarizing themselves with the exact nature and character of the conditions which might be met, or which in any way might attend or affect the execution of said proposed work. That notwithstanding said exhaustive examination and inspection of the proposed work, made at the time of the submission of said bid, and the execution of said contract, the existence of said submerged forest was not dis-

closed thereby and was entirely unknown to your petitioner or to any other person, so far as your petitioner is or ever has been advised.

That upon the award to it of said contract and during the progress and prosecution of the work referred to therein, it did at all times use, employ and provide a thoroughly modern, efficient and well-adapted plant, with which the work would have been completed in time but for the occurrence of the unforeseen and unforeseeable conditions herein referred to.

IX.

Your petitioner alleges that it proceeded with, and diligently prosecuted, said work, and that there was no delay in the prosecution of the parts of said work other than where said submerged forest was encountered, except such as was caused by said submerged forest, and that all of said canal would have been completed prior to the time fixed in said contract but for the difficulties encountered by and through said submerged forest.

17 That the failure of your petitioner to complete all of the work contemplated and provided for by said contract of August 15, 1908, within the period of time provided thereby, was in no sense due in whole or in part to the fault, failure, negligence or lack of diligence and skillful investigation and efforts on the part of your petitioner. On the contrary, the whole of the delay as to each and both of the divisions provided for in said contract was due entirely to the fact that during the progress and prosecution of said work your petitioner was confronted with, and did encounter, extraordinary and unforeseeable conditions, caused by, and the result of, abnormal force or violence of the elements which, without contribution or fault on claimant's part, actually prevented it from completing said work within the time fixed therefor, and rendered it entirely impossible for your petitioner to so complete said work.

That said delay in the completion of said work was caused wholly and entirely by conditions brought about, as herein referred to, by abnormal force and violence of the elements, such as were within the contemplation and intent of said contract; and that said conditions were extraordinary and unforeseeable conditions within the contemplation and intent of said specifications and contract.

That Captain Earl I. Brown, Engineer in charge of said work, in his endorsement of December 6th, 1909, in reporting thereon recommended an extension of time for completing the same, on account of said submerged forest having been encountered in the progress of the work; that said recommendation was disallowed by his superior, Major L. W. Ladue, in his endorsement of December 9th, 1909. That subsequently thereto said Captain Brown,

18 in his endorsement of March 15th, 1910, in reporting thereon to his superior officer, when referring to said submerged forest, made the following endorsement:

"The records show that about twenty per cent. of the working time of the plant has been lost by reason of this occurrence. This

amounts to three and six-tenths months' time, which he has been detained owing to those conditions, in addition to having the output of his dredges reduced during the actual time of work by an amount which cannot be computed."

That in his recommendation to Captain Earl I. Brown, of November 29th, 1909, Harry T. Patterson, Junior Engineer on the work, in referring to the submerged forest, says:

"(4) * * * It is believed that to date four month's delay can be ascribed to this cause and that perhaps two months' more delay will ensue from it.

* * * * * * *

"For the reasons given I would recommend that the time limit be waived five months, as requested."

X.

The said canal, consisting of divisions A and B, as provided for by said contract, and as completed by your petitioner, was but a very small part of a proposed continuous line of inland waterways along the Atlantic Coast, extending from Key West, Florida, to Maine.

That the construction of no contiguous part of said proposed continuous line of inland waterways has since been con-
19 tracted for or undertaken by defendants, and by reason thereof the part so completed by your petitioner has not been used to any practical extent for commercial purposes, and therefore the delay in the completion of said part has caused the Government no actual damage beyond the costs of superintendence and inspection.

That at the time said contract was entered into it was thoroughly understood and known by the Government officials that in the very nature of the case this would be true, and that said portion of said canal so completed by your petitioner could not be used to any practical extent for commercial purposes until the adjoining portions of said proposed line of inland waterways were completed, and that at the time said contract was entered into such additional work was not provided for or seriously contemplated within the time said work was completed by your petitioner. That by reason thereof the amounts withheld by the officers of the Government as alleged liquidated damages, aggregating the sum of $7,320, were in fact and effect not liquidated damages at all, but were and are being withheld as and for a penalty or forfeiture.

XI.

That neither of the two divisions of said canal which was to be excavated under said contract was nor could be used for any purpose whatever until the completion of the other division thereof; that the loss, therefore, if any, which the Government sustained, in addition to the costs of superintendence and inspection, by the delay in the completion of said canal was no greater per day before the 25th day of June, 1910, when division A was completed, than the

loss, if any, per day, after said date; that, notwithstanding
20 this fact, the officers of the Government, as hereinbefore set forth, deducted the sum of $40.00 per day as alleged liquidated damages for each day's delay previous and up to said date, and the sum of only $20.00 per day for the delay subsequent to said date; that said deductions during said entire period of delay in the completion of said canal, aggregating, as hereinbefore set forth, the sum of $7,320.00, therefore, could not and did not represent liquidated damages, but were and are being withheld as and for a penalty or forfeiture.

XII.

Your petitioner states that said submerged forest, occurring as it did in the part of said canal herein described, rendered excavation on that portion of the work vastly more difficult and expensive, and consumed about as much time as if large bowlders and compact gravel, such as are referred to in Paragraph 22 of said specifications, had been encountered: and that by reason of the difficulties and obstructions so caused by said submerged forests said contract was not profitable, and resulted in an actual loss of money to the contractors.

XIII.

Your petitioner, therefore, states that by reason of the facts hereinabove set forth, and by reason of the action of the officers and agents of the United States in connection therewith, there is wrongfully and illegally withheld from your petitioner the sum of seven thousand five hundred and thirty dollars and fifty cents, ($7,530.50); that the said amount of seven thousand five hundred and thirty dollars and fifty cents, ($7,530.50), has been earned by and is now due, owing and unpaid to your petitioner; and that there
21 exists in favor of the United States against this claimant no set-off or counter-claim of any kind or description. That the claim herein presented and sued upon has not been passed upon nor disallowed by the accounting officers of the Treasury department.

XIV.

Wherefore, by reason of the foregoing, your petitioner prays judgment against the United States of America in the sum of seven thousand five hundred and thirty dollars and fifty cents, ($7,530.50).

MARYLAND DREDGING & CONTRACTING COMPANY,
By C. C. CALHOUN, *Attorney.*

DANIEL B. HENDERSON,
J. BARRETT CARTER,
Of Counsel.

DISTRICT OF COLUMBIA, *ss*:

C. C. Calhoun, being first duly sworn according to law, deposes and says: That he has read the above amended petition and knows the contents thereof; that he is the attorney in fact for the petitioner therein named; that the allegations in said petition are true to the best of his knowledge, information and belief.

C. C. CALHOUN.

Subscribed and sworn to before me this 24th day of December, 1913.

FRANCIS L. NEUBECK,
Notary Public.

22 "CLAIMANT'S EXHIBIT A."

Improving Inland Waterway Between Pamlico Sound and Beaufort Inlet, North Carolina.

War Department.

Advertisement.

U. S. ENGINEERS OFFICE,
WILMINGTON, N. C., June 25, 1908.

Sealed proposals for constructing divisions A and B of inland waterway from Pamlico Sound to Beaufort Inlet, North Carolina, will be received at this office until 12 o'clock, noon, July 27, 1908, and then publicly opened. Information on application.

EARL I. BROWN,
Captain, Engineers.

General Specifications.

1. No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed. At the option of bidders certified checks for the amount of the guaranty required may be furnished in place of the guaranty.

2. All bids and guaranties must be made in duplicate upon printed forms to be obtained at this office.

3. Each guarantor will justify in the sum of $15,000 for each division of waterway bid upon. The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes, 487, chapter 120, and is expressed in the guaranty attached to the bid.

23 4. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of $40,000 for each division of waterway awarded, within ten days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in

the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract, which will provide for liquidated damages in an amount of $20 per day for each division, for any period of delay beyond the time agreed upon for completion.

5. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for constructing Division A (or B) Inland Waterway, Pamlico Sound to Beaufort Inlet, to be opened 7/27, 1908," and inclosed in another sealed envelope addressed to Capt. Earl I. Brown, Corps of Engineers, U. S. Army, Wilmington, N. C., but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

6. Whenever the term "engineer" is used in the specifications it is understood to refer to the officer of the Corps of Engineers, U. S. Army, in charge of the work. He will be represented on the work by as many assistants as may be necessary. Whenever the term "contractor" is used it is understood to refer to the second party to the contract. Subcontractors, as such, will not be recognized.

7. It is understood and agreed that the quantities given in these specifications are approximate only, and that no claim shall be made against the United States on account of any excess or de-
24 ficiency, absolute or relative, in the same. No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.

8. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

9. It is understood and agreed that the contractor assumes full responsibility for the safety of his employees, plant, and materials, and for any damage or injury done by or to them from any source or cause.

10. In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction is prohibited.

11. The contractor will be required to discharge any employee who, in the opinion of the engineer, is objectionable or incompetent. Such discharge shall not be made the basis of any claim for compensation or damages against the United States or any of its officers or agents.

12. The contractor must at all times either be personally present upon the work or be represented thereon by a responsible agent, who shall be clothed with full authority to act for him in all cases and to carry out any instructions relative to the work which may be given by the engineer either personally or through an authorized representative.

13. No work shall be done on Sundays or legal national holidays except in cases of emergency, and then only with the consent of the

engineer; nor shall any work be done at night unless authorized in writing by the engineer.

25 14. The attention of bidders is called to the following act of Congress:

An Act Relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

Sec. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

* * *

(Act approved August 1, 1892, 27 Stats. L., 340.)

All bidders are advised that, should the contractors for the work fail to comply with this law, they will be reported by the officers of the War Department for such action as the Department of

26 Justice may deem it proper to take. It has been decided by the United States Supreme Court that this law does not apply to persons engaged in the operation of dredges.

15. The contractor for each division will be required to commence work under the contract within forty-five days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it within eighteen months after said date of notification.

16. The time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and ex-

perience, unless extraordinary and unforeseeable conditions supervene.

17. Payments will be made monthly, if funds are available, based upon estimates of the work satisfactorily completed and accepted during the preceding month. A percentage of 10 per cent will be reserved from each payment until such percentage amounts to $20,000 on each division, after which no more will be retained, and the amount thus retained will be payable upon the satisfactory completion of the entire contract, except as herein otherwise provided for.

18. The quantities excavated will be determined by comparative surveys of each division, one survey being made shortly before the contractor begins work on said division, and others monthly, for the purpose of estimate, and at the completion of the contract. Excavation will be paid for by place measure, as determined from these surveys. Soundings will be taken with poles. Any material found within the limits of the prescribed cross section of the channel must be satisfactorily removed by the contractor before final acceptance and payment. Full contract price will be paid for
27 material properly removed from within the limits of the prescribed cross section. One-half of the contract price will be paid for all material removed from the next foot below the prescribed bottom grade and beyond the prescribed side slopes. Nothing will be paid for excavation outside of these limits.

19. Law.—Extract from river and harbor appropriation act, approved March 2, 1907, authorizing the contemplated improvement:

Improving and constructing inland waterway from Pamlico Sound to Beaufort Inlet, North Carolina, ten feet in depth, in accordance with the report of the Board of Engineers, submitted in House Document Numbered Eighty-four, Fifty-ninth Congress, second session, two hundred thousand dollars: Provided, That the Secretary of War may enter into a contract or contracts for such materials and work as may be necessary for the completion of said project not exceeding in the aggregate three hundred and fifty thousand dollars exclusive of the amounts herein and heretofore appropriated.

Of the $200,000 herein appropriated, $150,000 is now available for the work, and $170,000 is appropriated in sundry civil bill approved May 27, 1908, the remaining $180,000 is yet to be appropriated by Congress.

20. Proposed Work.—The improvement contemplates the excavation of a channel 10 feet deep between Beaufort Inlet and Pamlico Sound. The dimensions as given in the report of the Board of Engineers above referred to are as follows:

	Bottom width.	Side slopes.
Excavation through dry land	90	1:2½
Narrow part of rivers	125	1:3
Wide part of rivers	250	1:3
Open sounds and across bars	300	1:3

21. General Conditions.—The proposed waterway has its southern terminus in Beaufort Harbor and proceeds in a northerly
28 direction through Newport River to Core Creek, thence along Core Creek to its head and through the intervening land to the head of Adams Creek, thence down Adams Creek to its northern terminus in Neuse River. United States coast charts Nos. 420 and 144[2] with map of reconnaissance surveys made in connection with this route comprise the best available data.

The work will be divided into two divisions, each requiring the excavation of approximately 1,800,000 cubic yards. Division A will comprise that portion of the route from the Norfolk and Southern Railway bridge between Morehead City and Beaufort, N. C., to Core Creek Swamp. Division B will comprise that portion from the southern boundary of Core Creek Swamp to Neuse River. In Division A the channel follows the open marsh and cleared land, requiring practically no clearing, while the major portion of Division B lies in a heavily timbered swamp which the contractor will be required to clear in accordance with paragraph 24.

22. Character of Material.—The material is believed to be soft mud, sand, clay, shell, and silt. Each bidder, however, is expected to examine and decide for himself, as no allowance will be made should any of it prove to be otherwise than as stated, except that solid rock, large bowlders, and compact gravel will not have to be removed at the prices bid for ordinary excavation. If such materials should be encountered their removal, if required by the engineer, will be done under special agreement and paid for as extra work, as provided for in the form of contract to be entered into.

23. Dumping Ground.—Excavated material shall be deposited on such side of cut or channel as may be directed by the engineer. In Newport River and the wide portions of Core and Adams
29 creeks it shall be deposited not less than 200 nor more than 1,000 feet from the cut or channel, at such locality as may be designated. In the narrow part of the creeks and the intervening "dry land" excavation a right of way approximately 800 feet wide has been purchased by the United States and is available for dumping purposes, provided that no excavated material shall be deposited less than 25 feet from the edge of the cut or channel. Suitable openings through the excavated material shall be left to afford drainage to the adjacent lands wherever directed by the engineer. The contractor shall be responsible to adjacent property owners for any excavated material overflowing the right of way on to private property.

24. Clearing.—All trees growing in the area to be excavated and within 25 feet of the banks of the excavation will be removed by the contractor. The contractor shall have the right to use timber so cut in such accessory works as he may deem desirable. The channel must be cleared of all snags, logs, roots, stumps, or wreckage that project into or encroach in any way upon the cross section, as indicated in paragraph 27, the cost of same being included in the unit price bid for excavation.

25. Mean Low Water.—Wherever depths or elevations are noted,

they refer to depths below or elevations above mean low water, which is equivalent to a reading of 0.936 on the gauge at Beaufort, or 1.423 on the gauge at Morehead City draw, or 1.900 below the zero of the United States Geological Survey bench mark at Morehead City.

26. Bids.—Bids will be entertained for each section separately, or for both sections embracing the entire work, and award will be made separately or together, as may be deemed to be to the interests of the United States.

27. Excavation.—Dredges or other appliances will work on lines and in positions laid out by the engineer. Care must be taken to leave a reasonably even bottom at the depth required and a close approximation to the required side slopes. The contractor will be required to go over his work, if necessary, to produce this result.

28. Marks.—The United States will place suitable marks to show the general location of the channel and, when necessary, of the dumping ground, but all other marks, gauges, stakes, piles, temporary beacons, buoys, anchors, lines, flags, lights, etc., shall be furnished and placed by the contractor at his own expense.

29. Notices.—The contractor shall give written notice to the engineer at least ten days prior to the beginning, suspending (except in case of accident), or renewing of work under the contract, or by an excavator, dredge, or snagboat, to the end that the United States may make the necessary preparations without delaying the work. All delays, etc., resulting from failure of the contractor to give such notice, will be at the contractor's risk; and all extra cost to the United States of such delays, said cost to be determined by the engineer, may be deducted from the monthly payments.

30. Unsatisfactory Progress.—If at any time after the date fixed for beginning work it shall be found that operations are not being carried on at such a rate as will, in the opinion of the engineer, enable the work to be completed by the time specified in the contract, the engineer shall have the power, after due notice in writing to the contractor, to employ such additional plant or labor, or to purchase such material as may be necessary to insure the proper completion of the work within the time specified, and the entire cost thereof shall be a charge against any sums due or to become due the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract, or to enforce the stipulation in paragraph 4 providing for liquidated damages in an amount of $20 per day (for each division of the work, if more than one division be embraced in any one contract) for any period of delay beyond the time agreed upon, as provided for in the form of contract to be entered into.

31. Inspection.—Inspectors will be appointed by the engineer, whose duties will be to furnish the contractor with instructions regarding the alignment of excavations, etc., positions of cuts, depth of water, etc., and to inspect and keep a record of the excavation, to enforce a strict compliance with the terms of the contract and to see that the tide gauges, stakes, etc., are kept in proper order. The

contractor will furnish the inspectors with a suitable boat or boats, together with the necessary labor, for the proper performance of their duties, compensation for which shall be included in the price bid per cubic yard. He will provide separate and comfortable sleeping quarters for their use, and furnish good and suitable board for such inspectors, for which compensation will be allowed at a rate to be named in his proposal.

32. Supervision.—The work shall be executed under the supervision of the engineer, and in strict accordance with his instructions. The order of the work shall be subject to his approval; the alignment of the work shall be as prescribed by him. Work done in disobedience of his instructions, or without the knowledge of his agent on the work, will not be paid for. His decision as to quality, quantity, and interpretation of the specifications shall be final.

33. Exhaustion of Funds.—In case the funds available for the payments to the contractor become exhausted before the completion of the contract, the engineer will give written notice to the contractor that work may be suspended, but the contractor may, at his option, continue work under the conditions of the specifica-
32 tions so long as funds for proper superintendence and inspection, are available, but no longer, with the understanding, however, that no payments will be made for such work until additional funds have been provided in sufficient amount. In case work is suspended while awaiting appropriations by Congress, the contractor shall resume work within thirty days after notification that funds are again available for payments for work under the contract.

34. Plant.—The bidder must satisfy the United States of his ability to furnish the plant and to perform the work upon which he bids. He will state in his proposal the kind, capacity, number, and condition of the excavators, tugboats, barges, dredges, pontoons, scows, and other appliances which he proposes to use in the work. Should his proposal be accepted, these statements will constitute a part of the contract, and no material change in the working plant will be made without the knowledge and consent of the engineer. All plant and appliances must be kept in good condition and subject at all times to the inspection and approval of the engineer.

35. The contractor must keep suitable lights each night, between sunset and sunrise, upon all of his plant anchored upon the work and shall be responsible for all damages resulting from his neglect in this respect. All plant engaged upon the work must be so placed as to offer the minimum interference to navigation.

36. About 680,000 cubic yards of material must be excavated in Division A and 183,000 cubic yards in Division B before the right of way mentioned in paragraph 23 will be needed for the deposit of excavated material. It is believed that before this amount of excavation shall have been completed the right of way will be completely acquired by the United States, so that no delay need be caused to the contractor. But if this expectation should not be realized and the right of way should not be available when the
33 before-mentioned quantities of material have been excavated, then the contractor shall have the right to decide whether

he will terminate his contract at this point or will wait until the right of way has been acquired, and the United States is ready to proceed with the work. If the contractor choose the former, then a final settlement shall be made and there shall be no further obligation under the contract. If he choose the latter, then his contract shall continue in force. In this case extension of time to cover such delay will be granted, but the United States shall not be liable for any cost which may result from this delay.

34 *Contract.*

Form 19.*

1. This agreement entered into this fifteenth (15th) day of August, nineteen hundred and eight (1908), between Captain Earl I. Brown, Corps of Engineers, United States Army, of the first part, and Maryland Dredging and Contracting Co., of Baltimore in the county of ——, State of Maryland, of the second part, witnesseth, that, in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Captain Earl I. Brown, Corps of Engineers, U. S. Army, for and in behalf of the United States of America, and the said Maryland Dredging and Contracting Co., do covenant and agree, to and with each other, as follows:

The said party of the second part agrees to excavate or otherwise construct a channel ten feet deep at mean low water from Beaufort Inlet to Pamlico Sound, N. C., through Adams and Core Creeks, N. C., and through the intervening dry land (between the heads of these creeks) along lines to be laid out by said party of the first part, of the following dimensions:

	Bottom width.	Side slopes.
Excavation through dry land	90 feet	1:2½
Narrow part of rivers	125 "	1:3
Wide part of rivers	250 "	1:3

The work to be done covers both divisions A and B as described in paragraph 21 of the attached specifications, and contemplates the removal of 3,600,000 cubic yards, more or less, place measurement.

The party of the first part agrees to pay unto the party of the second part the sum of ten and three-fourths (10¾) cents per cubic yard, place measurement, for all material excavated in con-
35 formity with the attached specifications.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

*(To be used when the specifications call for liquidated damages.)

3. The said party of the second part shall commence the work herein contracted for within forty-five (45) days after date of notification of approval of the contract by the Chief of Engineers, U. S. Army, and shall complete the same within eighteen months, as set forth in paragraph 15 of the specifications.

4. If the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work as specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party of the second part, and upon the giving of such notice all payments to the party of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the
36 price herein stipulated to be paid the party of the second part for completing the same; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in the Section 3709 of the Revised Statutes of the United States.

5. It is further expressly understood and agreed that time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part to complete this contract within the time as specified and agreed upon that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance, and they are hereby agreed upon, liquidated, and fixed at the sum of twenty (20) dollars for each division for each and every day the party of the second part shall delay in the completion of this contract, and the party of the second part hereby agrees to pay to the United States as liquidated damages, and not by way of penalty, the sum of twenty (20) dollars for each division for each and every day the party of the second part shall delay in the completion of this contract, said delay not being the fault of the party of the first part.

It is further understood and agreed that the United States shall also have the right to recover from the party of the second part all costs of inspection and superintendence incurred by the United

States during the period of delay, and also a reasonable value
37 of any labor and materials which may be furnished by the party of the first part to the party of the second part during the time the latter is proceeding under this contract. And the party of the first part may deduct or retain all of the above-mentioned sums out of or from any money or reserved percentages that may be due or become due the party of the second part under this agreement.

Provided, however, that if the party of the second part shall by strikes, epidemics, local or State quarantine restrictions, or by abnormal force or violence of the elements, be actually prevented from completing the work or delivering the materials at the time agreed upon in this contract, and such delay is without contributory negligence on his or their part, such additional time may, with the prior sanction of the Chief of Engineers, be allowed him or them, in writing, for such completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance or extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for
38 those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, pay-

ment or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said party of the second part as prescribed in paragraph 17 of the specifications hereto attached and forming part of this agreement.

39 12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by said party of the second part are reserved to the United States.

13. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.*

But this stipulation so far as it relates to members of or delgates to Congress, is not to be construed to extend to this contract.

14. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

JAS. C. LODER, as to
Chief Clerk.

W. P. RYAN, as to

EARL I. BROWN,
Captain, Corps of Engineers, U. S. Army.

MARYLAND DREDGING & CONTRACTING CO.,
By F. A. FURST, *Pres.* [SEAL.]

Executed in triplicate.

Approved: September 10, 1908.
W. L. MARSHALL,
Brig. Gen., Chief of Engineers, U. S. Army.

40 IV. *Demurrer to Amended Petition. Filed January 6, 1914.*

Comes now the Government, by its Attorney General, and demurs to the amended petition herein filed, for the reasons, to wit:

First. The said amended petition does not state facts sufficient to constitute a cause of action in favor of this claimant and against the Government.

Second. It appears from the amended petition and from the pe-

tition heretofore filed herein that all the facts alleged in the amended petition were in substance alleged in the petition and that the decision of the court heretofore rendered on May 27, 1912, has never been vacated, modified, or set aside, and is res adjudicata of all the issues raised in the amended petition.

HUSTON THOMPSON,
Assistant Attorney General.
P. M. A.

S. S. ASHBAUGH,
Assistant Attorney.

41 VI. *Argument and Submission of Demurrer.*

On October 7, 1914 the demurrer of the defendants to the amended petition came on to be heard. Mr. S. S. Ashbaugh was heard in support of the demurrer; Mr. C. C. Calhoun was heard in opposition and the demurrer was submitted.

VII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 9th day of November, 1914, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises find for the defendants and do order, adjudge and decree that the demurrer of the defendants be sustained and that the amended petition of the claimant, The Maryland Dredging and Contracting Company, Incorporated, be, and the same is hereby dismissed.

BY THE COURT.

42 VIII. *Claimant's Application for and Allowance of Appeal.*

Comes now the claimant, by its attorney, and prays an appeal to the Supreme Court of the United States from the judgment entered herein on the 9th day of November, A. D. 1914, sustaining the demurrer to claimant's amended petition and dismissing the said petition.

C. C. CALHOUN,
Attorney for Claimant.

Filed December 14, 1914.

Ordered: That the above appeal be allowed as prayed for.
December 14, 1914.

BY THE COURT.

43 Court of Claims.

No. 31188.

THE MARYLAND DREDGING AND CONTRACTING COMPANY, INCORPORATED,
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the Court on the first demurrer; of the judgment of the Court sustaining the demurrer of the defendants to the amended petition of claimant, and dismissing the amended petition; of the application of claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 22" day of December, A. D., 1914.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 24,485. Court of Claims. Term No. 310. The Maryland Dredging and Constructing Company, appellant, vs. The United States. Filed December 24th, 1914. File No. 24,485.

No. 310

In the Supreme Court of the United States

THE MARYLAND DREDGING AND CONTRACTING COMPANY, INC.
Appellant

vs.

THE UNITED STATES

Appeal from the Court of Claims

BRIEF FOR THE APPELLANT

INDEX.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE MARYLAND DREDGING AND CONTRACTING COMPANY, INCORPORATED, *Appellant*,

v.

THE UNITED STATES.

No. 310

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

STATEMENT.

This is an appeal from a judgment of the Court of Claims sustaining the demurrer of appellee to appellant's amended petition.

In the suit below the appellant sought to recover $7,530.50 which had been retained by the appellee, in the final settlement, as representing liquidated damages and the cost of superintendence and inspection; this sum being the balance of the amount earned by the appellant under a contract for the excavation of a channel, fifteen miles in length, from Beaufort Inlet to Pamlico Sound, North Carolina.

The appellant filed in the Court of Claims, on September 30, 1911, a petition for the recovery of the above amount, which petition was demurred to and the demurrer sustained and the petition dismissed (R. 1).

For some reason, the Clerk of the Court of Claims insisted that the opinion of the Court below, in sustaining the demurrer to the original petition, be made a part of the record in the present case and this opinion is accordingly printed in full in this record. The attention of the Court is called to this fact at the threshold of the case, because this opinion of the Court below on the demurrer to the original petition is very misleading as to the demurrer to the amended petition and as to the allegations of the amended petition, for the reason that there is the greatest possible difference between the allegations of the original and amended petitions. Certain new and material facts as well as additional rights to recover and an entire new cause of action are alleged in the amended petition. Therefore, the impropriety of considering, on the present hearing, this opinion of the Court below on the demurrer to the original petition is manifest. There was no opinion rendered by the Court below on appellee's demurrer to the amended petition; a judgment was entered simply sustaining the demurrer (R. 25).

After this opinion and decision by the Court below sustaining the demurrer to the original petition, the appellant on December 30, 1913, filed its amended petition, which is now under consideration.

A clear undertanding of the allegations of this amended petition being indispensable to a proper consideration of the questions raised by the demurrer thereto, the attention of the Court is first respectfully invited to the following outline of the principal allegations thereof:

OUTLINE OF ALLEGATIONS OF AMENDED PETITION.

PARAGRAPHS II, III, AND IV (R. 5, 6, 7).

It is alleged that the plaintiff and defendant entered into a contract August 15, 1908, by which plaintiff was to excavate a channel, fifteen miles in length, from Beaufort Inlet to Pamlico Sound, N. C., through Adams and Core Creeks and the intervening dry land between the head waters of said creeks, the width to be as follows:

Through the dry land..... 90 feet.
Through narrow part of river.....125 feet.
Through wide part of river.....250 feet.

That the work was divided into two schedules, A and B, and was to be completed on or before March 15, 1910, unless certain conditions arose.

Said contract is filed as a part of the petition.

PARAGRAPH V (R. 7).

The work was completed in a satisfactory manner and accepted by the Government. In the final settlement, $7,320 was withheld as liquidated damages and $210.50 as additional costs for superintendence and inspection over plaintiff's protest.

PARAGRAPH VI (R. 8).

Article V of the contract is quoted in full, the following being the principal provisions now under consideration:

> "It is further expressly understood and agreed that time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part

to complete this contract within the time as specified and agreed upon, that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance, and they are hereby agreed upon, liquidated and fixed at the sum of twenty dollars ($20.00) for each division for each and every day the party of the second part shall delay in the completion of this contract." * * *

"It is further understood and agreed that the United States shall also have the right to recover from the party of the second part all costs of inspection and superintendence incurred by the United States during the period of delay." * * *

"Provided, however, that if the party of the second part shall * * * by abnormal force or violence of the elements, be actually prevented from completing the work * * * at the time agreed upon in this contract, and such delay is without contributory negligence on his or their part, such additional time may, with the prior sanction of the Chief of Engineers, be allowed him or them, in writing, for such completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance or extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

Said deductions were claimed, by the defendant, to have been made under this section.

Paragraph 16 of the specifications is quoted, wherein it is set forth that the time allowed in the specifications is considered sufficient for the completion of the contract,

"unless extraordinary and unforeseeable conditions supervene."

Paragraph 22 of the specifications is quoted, which begins as follows:

> "CHARACTER OF MATERIAL. The material is believed to be soft mud, sand, clay, shell and silt. * * *"

It is further provided that if solid rock, large boulders and compact gravel are encountered and required to be removed, extra compensation will be allowed therefor.

PARAGRAPH VII (R. 9).

The following description of the course of the canal is given:

> "Beginning at Beaufort Harbor, or Inlet, thence, in a northerly direction. through Newport River, to Core Creek, thence along the bed of Core Creek to its head, thence running through the dry land lying between Core Creek and Adams Creek; covering a distance of about ten miles from the beginning; thence along the bed of Adams Creek for a distance of about five miles to its mouth, or northern terminus, in Neuse River," the total length being 15 miles.

It is alleged that no exceptional difficulty was encountered in Core Creek, the head waters of Adams Creek or the dry land, covering a distance of ten miles. The work on said portion could and would easily have been completed in time but for a submerged forest which was encountered in the last five miles in Adams Creek.

That said Adams Creek is in the nature of an inlet from the Neuse River and sea, with a high and low tide. Its average width is about 2,300 feet for the five miles where the submerged forest was encountered. At this point

it is and was an open navigable body of water, free from rocks, stumps and growing trees.

That in the construction of the canal, 250 feet in width, with a uniform depth of ten feet at mean low water, the contractor encountered a submerged forest at a depth of about eight feet beneath the bottom of the water in said creek, between which water and said submerged forest was an intervening body of earth, about eight feet thick, which completely covered and obscured said submerged forest. Said forest consisted of roots and stumps in an upright position, firmly imbedded in the earth, and it is alleged that it became submerged through some abnormal force and violence of the elements. Said stumps and roots were located at such a distance apart as to make it impossible to discover them through he ordinary and customary method of inspection and examination, but were near enough to make it impossible to do the work in the customary manner with ordinary and customary machinery, as contemplated by the advertisement, contract and specifications.

It is alleged that said submerged forest was the result of some abnormal force and violence of the elements, and that said forest was itself such an abnormal force of the elements as to prevent, and that it did prevent, the completion of the work by the time agreed upon. That by reason of its location, said submerged forest caused such "extraordinary and unforeseeable conditions to supervene" in the completion of the work as to cause the delay.

PARAGRAPH VIII (R. 10).

Prior to the submission of its bid, the plaintiff, other contractors, and the Government made an exhaustive and painstaking effort, conducted with the utmost skill

and care, to ascertain the exact nature of the conditions which might be met in the execution of the work; notwithstanding this, the existence of said submerged forest was not disclosed and was entirely unknown.

At all times the plaintiff employed a thorough, modern and well-equipped plant in the execution of the work.

PARAGRAPH IX (R. 11).

There was no delay in the prosecution of any part of the work, except where said submerged forest was encountered, beneath the water and earth in said stream, and all of said canal could and would have been completed on time but for said submerged forest so encountered.

It is alleged that the failure to complete the said work was in no sense due to the fault, failure, negligence or lack of diligence on the part of the plaintiff, but was due entirely to "*extraordinary and unforeseeable conditions*" caused by, and the result of, some abnormal force and violence of the elements, which prevented and rendered impossible the completion of the work by the time fixed.

It is alleged that said delay was caused entirely by conditions brought about by some "*abnormal force and violence of the elements*" as contemplated by said contract, and that said conditions were extraordinary and unforeseeable as contemplated by the contract.

It is alleged that Captain Earl I. Brown, engineer in charge of said work and who executed said contract for the Government, recommended an extension of time on account of said submerged forest, which was disallowed by his superior officer. Subsequently, said Captain Brown reported that, "the records show that about 20 per cent of the working time of the plant has been lost by reason of this occurrence;" in addition to having the output of

the dredges reduced during the actual time of the work by an amount which could not be indicated.

Harry T. Patterson, junior engineer of the work, recommended that by reason of said submerged forest, the time limit be waived five months

PARAGRAPH X (R. 12).

It is alleged that said canal, as provided for and as completed, is but a very small part of a proposed continuous line of waterways, extending from Key West, Florida, to Maine.

The construction of no contiguous part of said proposed continuous line has since been contracted for or undertaken, and the part so completed has not been used to any practical extent, and therefore the delay in its completion has caused the Government *no actual damage beyond the cost of superintendence and inspection.*

At the time the contract was entered into it was thoroughly understood by the both parties that the portion of the canal so completed could not be used for any commercial purposes until the adjoining portions were completed, *and additional work was not seriously contemplated within the time the work was completed by plaintiff;* that by reason thereof, the amount of $7,320 withheld by the Government *was not in fact and effect for liquidated damages, but for a penalty or forfeiture.*

PARAGRAPH XI (R. 12).

It is alleged that neither of the two divisions completed by plaintiff could be used for any purpose whatever until the completion of the other, and the loss, therefore, in addition to the cost of superintendence and inspection by the delay was no greater per day before one division was

completed than it was after one division was completed. For this reason the deduction of $7,320 could not represent liquidated damages, but was a penalty or forfeiture.

PARAGRAPH XII (R. 13).

It is alleged that said submerged forest, occurring at the point and in the manner in which it did, rendered excavation on that portion of the work vastly more difficult and expensive, and consumed about as much time as if large boulders and compact gravel, such as referred to in paragraph 22 of the specifications, had been encountered, and by reason thereof said work was performed at a loss to plaintiff.

PARAGRAPH XIII (R. 13).

That said $7,530.50 has been earned by, and is now due, and is wrongfully and illegally withheld from, claimant.

The following is a pertinent provision of the specifications which, together with the contract, was made a part of the amended petition, and which was covered by the allegations of the amended petition, but not quoted therein (R. 6).

Section 32 of the specifications provides that the decision of the engineer in charge, "as to quality, quantity, and interpretation of the specifications shall be final" (R. 20).

ASSIGNMENT OF ERROR.

In sustaining the demurrer to this amended petition it is respectfully submitted that the Court of Claims committed the following errors:

1. In holding that the encountering of the submerged forest, in the manner and under the circumstances, as alleged in the amended petition, did not constitute such "extraordinary and unforeseeable conditions to supervene" as were contemplated by the provisions of Section 16 of the specifications.

2. In holding that the encountering of said submerged forest, in the manner and under the circumstances, as alleged in the amended petition, by which the contractor was, "actually prevented from completing the work," at the time agreed upon in the contract, did not offer such an "abnormal force and violence of the elements" as would entitle the contractor to an extension of time in accordance with the provisions of Article V of the contract.

3. In holding that the decision and recommendation of the engineer in charge, that the submerged forest so encountered entitled the contractor to an extension of time, was not binding upon the United States.

4. In holding that the interpretation placed upon the provisions of the contract by Captain Earl I. Brown, by whom the contract was prepared and in whose name it was executed for and on behalf of the United States, to the effect that in accordance with the terms of the specifications and contract the contractor was entitled to an extension of time by reason of encountering said submerged forest was not binding upon the United States.

5. In holding that the amount deducted as liquidated damages was not a penalty but was, in fact, liquidated damages.

6. In sustaining the demurrer to appellant's amended petition and in dismissing the amended petition.

THE TWO PRINCIPAL QUESTIONS INVOLVED.

The appellant bases its right to recover upon two broad propositions, in the consideration of which it is respectfully submitted the Court below committed the above errors. The attention of this Court is respectfully invited to a discussion of these two propositions in their natural order, which briefly stated are as follows:

First. That of appellant's right to recover the entire amount claimed, on the ground that the delays with which it was charged were caused by the intervention of "*extraordinary and unforeseeable conditions*," as contemplated by paragraph 16 of the specifications; and by *abnormal force of the elements* as contemplated by Article 5 of the contract. The entire amount claimed, to wit, $7,530.50, covers the amounts withheld as so-called liquidated damages and the cost of superintendence and inspection.

Second. Its right to recover the sum of $7,320.00, representing the amounts which were withheld as so-called *liquidated damages* only, on the theory that such withholding in fact constituted a *penalty*.

ARGUMENT.

I.

THE SUBMERGED FOREST ENCOUNTERED AS IT WAS ENTITLED APPELLANT TO AN EXTENSION OF TIME.

It is contended on behalf of appellant that by encountering the submerged forest as it did, it became entitled to an extension of time under both paragraph 16 (R. 16) of the specifications and Article V (R. 22) of the contract. That said submerged forest was caused by some abnormal force and violence of the elements and was itself such an

abnormal force of the elements as was contemplated by the contract, and as such caused extraordinary and unforeseeable conditions to supervene as contemplated by section 16 of the specifications.

In the Court below the following was earnestly urged and evidently followed by the Court: That the failure of the claimant to find the submerged forest was in no way the fault of the government. Conceding this to be true, we fail to perceive its materiality, since appellant's right of recovery does not depend upon an allegation or proof that the government was at fault in this respect, but is based upon the fact that the submerged forest was not discoverable by the exercise of due care and diligence and therefore constituted "extraordinary and unforeseeable conditions" within the meaning of the contract.

In support of that contention reliance was placed on that part of paragraph 7 (R. 15) of the specifications which provides that:

> "No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work."

This pargraph of the specifications must, however, be read in connection with paragraph 16 (R. 16) which recites that:

> "The time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital and experience *unless extraordinary and unforeseeable conditions supervene.*" (Italics ours.)

Taking the two paragraphs together, their reasonable intent and meaning, as far as allowance for delays is concerned, is that the contractor would be allowed an extension of time if the work was delayed by "*extraordinary and unforeseeable conditions,*" for the reason that he could not be expected to correctly estimate difficulties

which might be caused by such conditions.

If this provision of paragraph 7, which is very common to Government contracts, be so construed as to impose upon the contractor the risk of all consequences flowing from his failure to estimate every difficulty, whether forseeable or unforseeable, then paragraphs 16 and 22 of the specifications and the last paragraph of Article V ofthe co ntract, which latter specifically provides for time extensions, are meaningless.

Our construction is not in the least in conflict with the provision in paragraph 24 of the specifications, namely, that;

> "all trees growing in the area to be excavated and within 25 feet of the banks of the excavation will be removed by the contractor * * *. The channel must be cleared of all snags, logs, roots, stumps or wreckage that project into or encroach in any way upon the cross section, * * *"

This was evidently intended to cover particularly that part of the canal described in the latter part of paragraph 21 of the specifications referred to as;

> "* * * a heavily timbered swamp which the contractor will be required to clear in accordance with paragraph 24."

It would be most unreasonable to hold that this description, found in paragraph 24 of specifications, which relates especially to the dry land and a heavily timbered swamp should impose upon the contractor the responsibility for completing the work on time under such abnormal conditions as are alleged in the amended petition to have been encountered on another part of the canal where the existence of such conditions were practically impossible of ascertainment without doing the work. It

certainly cannot be successfully contended that by reason of the canal running through a heavily timbered swamp for a portion of the distance the contractor assumed the risk of encountering a submerged forest 8 feet beneath the top of the ground, which was itself at the bottom of a navigable stream 8 feet deep and from 500 to 3200 feet wide, moreover, it was a long distance from the portion of the canal which was to be cut through the dry land and swamp.

In this connection, attention is invited to paragraph 22 of the specifications, wherein it is declared that the material is believed to be "soft mud, sand, clay, shell and silt," and that no allowance would be made should any of it prove to be otherwise;

> "Except that solid rock, large boulders and compact gravel will not have to be removed at the prices bid for ordinary excavation. If *such* materials should be encountered, their removal if required by the engineer will be done under special agreement." (Italics ours.)

It is evident that the word "*such*" as here used meant of like kind or character in regard to the difficulty in handling or the cost of removing, and was used to protect the contractor against just such hardship as was encountered. This is in accord with the following authorities:

> Commonwealth v. Miller, 57 Mass. (3 Cush.) 243, 254.
>
> Ventura County v. Clay, 44 Pac. 488, 491, 112 Cal. 65.
>
> Ogden v. Glidden, 9 Wis. 46, 52.
>
> Travers v. Wallace, 49, Atl. 415, 417, 93, Md. 507.

The amended petition avers, however, that the submerged forest rendered excavation on that portion of the work vastly more difficult and expensive than would have been the removal of solid rock, boulders or compact gravel, and that such excavation consumed as much time as would the removal of solid rock, boulders and compact gravel. This being the case, appellant is not only justified in contending that it should not be penalized for the delay in the completion of the work, but it would have the right to claim extra compensation on account of the removal of material more difficult to remove than that of the class specifically named for which it would be entitled to extra compensation. No claim, however, is made for extra compensation.

The fact that solid rock, boulders and compact gravel are referred to in the specifications, and the very fact that both the specifications and the contract are silent as to the existence of any such obstruction as a submerged forest, such as was encountered here, fortifies the contention of the appellant that such an obstruction was extraordinary and unforeseeable and could not have been discovered by either the appellant or the appellee or any of the other bidders until it was actually encountered during the progress of the work.

1.

APPELLANT ENTITLED TO AN EXTENSION UNDER PARAGRAPH 16 OF THE SPECIFICATIONS.

We come now to a consideration of the question whether paragraph 16 of the specifications, which says that the time allowed is considered sufficient for the completion of the work, "*unless extraordinary and unforeseeable con-*

ditions supervene," should be considered in determining whether appellant is entitled to relief from the penalty imposed on account of the delay.

The meaning of these words are made clear by considering them in connection with paragraph 15 immediately preceding, which provides that the work should be completed within 18 months from the date of the notification of the approval of the contract, which paragraph 16 says "is considered sufficient * * * *unless extraordinary and unforeseeable conditions supervene.*'

These two paragraphs of the specifications, standing together and being so closely related, must, of course, be considered together, and if they are considered together the only meaning they convey is that the contractor would be required to complete the work within the period named "*unless extraordinary and unforeseeable conditions supervened.*" When, therefore, the claimant submitted its bid it did so with the assurance on the part of the Government that the time limit would not be adhered to if "*extraordinary and unforeseeable conditions supervened.*"

This is the only reasonable construction which can be placed upon paragraph 16 of the specifications, and if it is not held to be a part and parcel of the contract, then Article I of the contract itself has no significance whatever when it says that: "In conformity with the advertisement and *specifications* hereunto attached, *which form a part of this contract*" (R. 14), the parties covenant, agree, etc.

Moreover, as will hereinafter be more fully pointed out, this interpretation of paragraph 16 is full in accord with that of its author, Capt. Earl I. Brown. *This officer prepared the specifications, as well as the contract, including this paragraph, also the paragraph providing that his interpretation of them should be final, and, when the question arose he construed this paragraph to mean that the encoun-*

tering of such an obstruction as the submerged forest entitled the claimant to an extension of time. As his interpretation of the specifications is made final, the Court should be governed by his construction thereof.

2.

APPELLANT ENTITLED TO EXTENSION UNDER ARTICLE V OF THE CONTRACT.

That the above was the intention of the parties at the time the contract was entered into is further confirmed by the language used in the proviso of Article 5 of the contract. At the beginning of this proviso the conditions under which appellant would be entitled to an extension of time were first specifically stated as "strikes, epidemics, local or State quarantine restrictions"; this is immediately followed by the general statement, "*or by abnormal force or violence of the elements.*"

The phrase "abnormal force or violence of the elements" are words of general description and were clearly intended to entitle appellant to an extension for *every* "extraordinary and unforeseeable condition" which might be encountered, not only by strikes, epidemics and quarantine restrictions, but for those which were caused by *any* "abnormal force or violence of the elements."

It cannot be denied that this submerged forest, encountered as shown in this amended petition, which is admitted here to be true, caused "extraordinary and unforeseeable conditions to supervene." That it was, as alleged in the amended petition, the result of some "abnormal force or violence of the elements" is a matter of general knowledge. That it was, as alleged in the amended petition, itself an abnormal force of the elements, causing "extraordinary

and unforeseeable conditions to supervene," which resulted in the delay, is established by the reports and recommendations of appellee's engineers in charge, as alleged in the amended petition. The fact that it was a latent force did not change its condition from abnormal to normal, but on the contrary made it unforeseeable.

If a submerged forest, located as this is alleged in the amended petition, to have been, did not interpose an abnormal force to the completion of this work, it would be difficult to conceive what would constitute an abnormal force.

That it was, as alleged in the petition, unforeseeable, appears from the very conditions set forth in the petition and established by the fact that the thorough examination made by the appellant and other contractors, as well as appellee itself, failed to disclose its existence, and the further fact that it is not even hinted at in the description found in the specifications of the materials proposed to be removed.

From this it would appear that even without invoking the familiar rule of construction, that doubtful provisions of contracts are to be construed against the party making them, there can be no question but that appellant is entitled, under this provision, to an extension of time.

The fact that the term "submerged forest" was not included in Article V of the contract did not exclude this as a ground for extension of time any more than did the omission of such words as "coal mines" or "iron mines," or the like. Certainly if the contractor had encountered a coal mine or any other mine, located as was this submerged forest, it would have been entitled to an extension of time. Not only would it have been entitled to an extension of time, but, as in the case of large rock, boulders and compact gravel, it would in all justice have

been entitled to extra compensation for removing the same. The omission of such terms as these would not imply at all that they would not be considered such "extraordinary or unforeseeable conditions" as would justify an extension of time. Their omission simply indicated that the parties to the contract did not in the least anticipate that such obstructions would be encountered.

The specifications show that despite their failure to discover them, through the inspection and examination which appellee and appellant had made, it was anticipated that possibly large rocks, boulders and compact gravel might be encountered, so that it cannot be held that for the reason this submerged forest was not discovered prior to the execution of the contract, the appellant is not entitled, under the contract, to an extension of time.

Moreover, as before stated, the use of the terms "abnormal force or violence of the elements" clearly indicates the purpose of the Government to give relief to the contractor in the event it encountered any "extraordinary and unforeseeable" obstruction furnished by nature.

> "If an event such as cannot reasonably be supposed to have been in contemplation of the parties when the contract was made makes performance impossible, the parties will not be bound by general words, which, though large enough to include it, were not used with reference to the possibility of the particular contingency. Bailey *v.* DeCrespigny, L. R. 4 Q. B. 180."
>
> (Note in 14 L. R. A. 215. Stewart *v.* Stone.)

3.

PROVISIONS OF CONTRACT AND SPECIFICATIONS RELIEVING CONTRACTOR FROM PERFORMANCE, EQUIVALENT TO THE PHRASE "ACT OF GOD."

The phrases contained in Article V of the contract, "by abnormal force and violence of the elements," and in section 16 of the specifications, "unless extraordinary and unforeseeable conditions supervene," are equivalent to and should be given the same meaning, force and effect as the well-known phrase "Act of God" used in contracts, as clearly appears from the following:

> "The elements are the means by which God acts, and we are unable to perceive why 'damages by the elements' and 'damages by the acts of God' are not convertible expressions. Packard *v.* Taylor, 35 Ark. 402, 37 Am. Rep. 37; Polack *v.* Pioche, 35 Cal., 416, 95 Am. Dec. 115." (1 Cyc. 758.)
>
> "In numerous cases the Court has expressed the opinion that the words 'inevitable accident' and 'unavoidable accident' are exactly equivalent to the expression 'act of God.' Sprowl *v.* Kellar, 4 Stew. & P. (Ala.) 382." (1 Cyc. 758.)
>
> "The term (act of God) has received a variety of definitions, differing rather in their mode than in the subject of their signification. It is said to be that which is occasioned exclusively by the violence of nature. New Brunswick Steamboat & Canal Transp. Co. *v.* Tiers, 24 N. J. Law (4 Zab.) 697, 714, 64 Am. Dec. 394." Followed by a long list of authorities supporting this principle. (1 Words & Phrases, 118.)

If this equivalent phrase, "Act of God," had been used in the contract and specifications, instead of the phrases which were used, there can be no doubt but that the con-

tractor, upon the principle announced by the following authorities, would have been entitled to an extension of time on account of encountering this submerged forest at the point and under the conditions alleged in the amended petition.

> "The striking of a vessel on a rock not generally known, and not actually known to the master of the vessel, is the act of God, for which the carrier is not responsible to the shipper whose goods are lost. Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235."
>
> "Where a steamship company contracted to carry a passenger to a certain port, an ice block preventing the port being reached was an act of God excusing the breach. Bullock *v.* White Star Steamship Co., 70 Pac. 1106, 30 Wash. 448." (1 Words and Phrases, 119.)

If the striking by a ship of a rock, which was not generally known, be held to be an act of God, which relieved the carrier from liability to the shipper, and the encountering of an ice block, in the attempt to reach port, be held to be an act of God, excusing the breach of the contract with a passenger, the conclusion cannot be escaped that the encountering of a submerged forest, as alleged in this amended petition, at a point and under conditions which were not only unknown, but not even imagined by any of the parties, should be held to be such an "act of God," or "*abnormal force of the elements*," *or such* "*extraordinary or unforeseeable conditions*," as would relieve the contractor from the obligation to complete the work by the time specified.

4.

NO INCONSISTENCY BETWEEN PARAGRAPH 16 OF THE SPECIFICATIONS AND ARTICLE V OF THE CONTRACT.

There is no inconsistency whatever between paragraph 16 of the specifications and Article V of the contract. The specifications being as much a part of the contract as the contract itself, both of these provisions must stand. Paragraphs 15 and 16 of the specifications notified the contractor that the work must be completed within the time fixed "*unless extraordinary and unforeseeable conditions supervene.*" While Article V of the contract does not set out verbatim each and every condition which might be considered extraordinary and unforeseeable, it does plainly show, at least, that the contractor was not to be penalized if it was hindered in the work by an unforeseeable force of nature, which this submerged forest undoubtedly was.

In construing a contract and specifications very similar to those in the present case the correct rule of interpretation was very tersely stated by the Court of Claims in the case of New Jersey Foundry and Machine Company *v.* United States (44 Ct. Cls. 570). In that case the claimant contended that as the contract and t'.e specifications each contained a provision on the same subject, the provision in the contract should control to the exclusion of that in the specifications.

In deciding against this contention, the Court, at page 580, said:

> "It is doubtless true that where there is an inconsistency in the provisions of the contract and the provisions of the specification, the positive language of the contract should prevail (Meyer *v.* Berlandi, 53 Minn. 59); *but it is equally well settled that all parts of a contract will be con-*

strued in such a way as to give force and validity to all of them, and to all the language used, when that is possible. (2 Parsons on Contracts, 505.)" (Italics ours.)

5.

CONSTRUCTION GIVEN BY ARBITRATOR NAMED IN CONTRACT TO GOVERN.

The Court's attention is most respectfully invited to the following provisions of the specifications and contract:

Section 6 of the specifications:

> "Whenever the term 'engineer' is used in the specifications it is understood to refer to the officer of the Corps of Engineers, U. S. Army, in charge of the work" (R. 15).

Section 15 of the specifications:

> "The contractor for each division will be required to commence work * * * and to complete it within eighteen months after said date of notification" (R. 16).

Section 16 of the specifications:

> "The time allowed in these specifications for the completion of the contract * * * is considered sufficient * * * unless extraordinary and unforeseeable conditions supervene" (R. 16).

Section 32 of the specifications:

> "The work shall be executed under the supervision of the engineer, and in strict accordance with his instructions. * * * His decisions as to quality, quantity *and interpretation of the specifications shall be final.*" (Italics ours.) (R. 20.)

Section 1 of the contract:

> "This agreement entered into * * * between *Captain Earl I. Brown, Corps of Engineers, United States Army, of the first part, and Maryland Dredging and Contracting Co.*, * * * of the second part, witnesseth, that * * * *the said Captain Earl I. Brown, Corps of Engineers, U. S. Army, for and in behalf of the United States of America*, and the said Maryland Dredging and Contracting Co., do covenant and agree, to and with each other, as follows:" (Italics ours.) (R. 21.)

Section V of the contract:

> "Provided, however, that if the party of the second part by strikes, epidemics, local or State quarantine restrictions, or by abnormal force or violence of the elements, be actually prevented from completing the work * * * at the time agreed upon in this contract, * * * such additional time may, with the prior sanction of the Chief of Engineers, be allowed him or them in writing, for such completion *as, in the judgment of the party of the first part, or his successor*, shall be just and reasonable." (Italics ours.) (R. 22.)

The contract is signed "Earl I. Brown, Captain Corps of Engineers, U. S. Army," and he is named in the contract as the party of the first part (R. 24).

It is alleged in the amended petition, and is a part of the record in the case, that Captain Earl I. Brown, in his endorsement of December 6, 1909, recommended an extension of time on account of said submerged forest (R. 11). Notwithstanding this recommendation failed to receive the sanction of his superior, Captain Brown, in March, 1910, when again referring to this submerged forest, says, that the records show that the contractor

was detained by it about three and six-tenths months in addition to having the output of his dredges reduced during the actual time of the work (R. 11).

It is also alleged that the junior engineer, Mr. Patterson, who had the supervision of the work directly under his charge, had as early as November 29, 1909, recommended that the time limit be waived five months on account of said forest (R. 12).

Thus it is seen that Captain Earl I. Brown was the party of the first part to this contract, which he executed on behalf of appellee; that he was the engineer in charge of the work; that Section 15 of the specifications requires that the work be completed within eighteen months after the date of notification; that Section 16 states that this time is considered sufficient "*unless extraordinary and unforeseeable conditions supervene;*" that Section 32 of the specifications provides that the engineer's "*interpretation of the specifications shall be final;*" that Article V of the contract provides that under certain conditions, with the sanction of the chief engineer, "such additional time may * * * be allowed * * * *as in the judgment of the first party or his successor* (Captain Earl I. Brown, 'the engineer') *shall be just and reasonable.*" (Italics ours.)

Here we have one of the parties to the contract, who was also the party specifically agreed upon whose interpretation of the specifications should be final and upon whose judgment, according to the contract, the time might be extended as he should determine was just and reasonable, and who, on account of having charge of the work, was thoroughly familiar with the conditions, interpreting the specifications and contract as entitling appellant to an extension on account of those conditions. In spite of this appellee comes into Court and attempts to

repudiate the decision of this arbitrator, and says that appellant has no standing in Court when it sets up the very conditions which the arbitrator held were covered by the specifications and contract and entitled appellant to an extension of time.

(a). SANCTION OF CHIEF ENGINEER MINISTERIAL AND NOT JUDICIAL ACT.

Whilst it is true that under Article V of the contract the engineer in charge did not have the *authority*, without the sanction of the Chief Engineer, to extend the time of the contract, this does not in the least affect the *discretion*, judicial in its nature, which was by the terms of the specifications and contract conferred upon the engineer in charge alone to determine what the *rights* of the parties were as to such extension. The specifications provide that his interpretation thereof *shall be final*, and in interpreting them he held *that it was proper that allowance should be made to the contractor.*

Notwithstanding this, the Chief Engineer, Maj. Wm. B. Ladue, in his endorsement of December 9, 1909, undertook to interpret the specifications himself and to overrule this decision of the engineer in charge. As the contract had three months more to run, no action was taken on the remission.

His interpretation of the specifications having been attempted to be set aside by the Chief Engineer, the engineer in charge, Captain Earl I. Brown, in his endorsement of March 15, 1910, in referring to this submerged forest, says:

> "The records show that about twenty per cent. of the working time of the plant has been lost by reason of this occurrence. This amounts to three

> and six-tenths months' time, which he has been detained owing to those conditions, in addition to having the output of his dredges reduced during the actual time of work by an amount which can not be computed" (R. 11).

Thus in spite of the declaration of the Chief Engineer, the engineer in charge, the arbitrator, whose decision thereon was to be final, again calls attention to the delay caused by this submerged forest, which evidently was made for the purpose of emphasizing his former recommendation that the contractor was entitled to an extension of time.

This was followed by the recommendation of the junior engineer in charge of the work, Harry T. Patterson, who, in his recommendation of November 29, 1909, to his superior, in referring to this submerged forest says:

> "It is believed that to date four months' delay can be ascribed to this cause and that perhaps two months' more delay will ensue from it. * * *
>
> "For the reasons given I would recommend that the time limit be waived five months, as requested" (R. 11).

The contract provides that such additional time may be allowed as in the *judgment* of the engineer in charge "shall be *just and reasonable*." But under the contract, in order that the contractor might enjoy the extension of time which the engineer in charge might decide was just and reasonable, the sanction or approval of the Chief Engineer must first be had. In violation of this provision the Chief Engineer, as appears from the above, directed that the engineer in charge, the arbitrator and the man who drew the contract, should limit his decision as directed by the Chief Engineer; which was nothing short of a clear and unwarranted usurpation of authority in violation of the rights of the contractor under the contract.

Let us see the reason for this provision that the sanction of the Chief Engineer must be obtained before the contractor could receive the benefits of the decision of the arbitrator, and what his duties were in relation thereto.

Nowhere in the specifications or contract does it appear that the Chief Engineer, who was entirely unfamiliar with the conditions, should exercise any *judicial discretion as to the extension of time.* His duties, under the contract, were purely ministerial or executive and did not in the least relate to a determination of what the *rights* of the parties were under the contract, because he was not made an arbitrator or judge between them. The use of the word *sanction* implies that he was not to exercise any *judicial discretion* in the matter; but since the contract had to be approved by him, any modification of it, such as extending the time, likewise had to receive his sanction or be approved by him. In order to prevent fraud or gross mistakes from being made, the Government has adopted a general policy, requiring that all contracts, or modifications thereof, such as an extension of time, be approved by the engineer, the head of the Department, or such like officer.

When the arbitrator found what in his *judgment* was "*just and reasonable,*" the rights of the parties became fixed and it was the duty of the Chief Engineer, acting in a ministerial or executive capacity, to sanction the extension of time, if no fraud or mistake had been committed, and, if he did not do so, the contractor had the right at law to enforce his rights as determined by the arbitrator, the engineer in charge.

The Chief Engineer could, if he chose for any reason, refuse to sanction the extension of time and thereby stop the work at the end of the time, or allow it to proceed under such conditions as he might dictate, *but he had no authority to determine the rights of the parties and could*

not exempt appellee from liability for its actions. This provision conferred no greater authority upon the Chief Engineer than does the general requirement that the sanction of the bondsman shall be obtained to an extension of the time named in the contract.

(b). AUTHORITIES ON PROVISION THAT DECISION OF ENGINEER IN CHARGE SHALL BE BINDING.

The importance to be attached to such provisions, as the above, in leaving matters of dispute to the engineer in charge of the work, in contracts of a similar character, is fully discussed in the case of the United States *v.* Gleason, 175 U. S. 589; 44 L. Ed. 284.

Briefly stated, the Gleason case covered two actions—consolidated—by the contractors against the United States to recover retained percentages, amounting to $5,412.99, and anticipated profits, amounting to $63,265, which the contractors claimed they were entitled to by reason of the refusal of the Government to extend the time for the completion of the work, to which they were entitled under the contract. The case turned upon the construction of the meaning of that clause of the contract relating to the agreement that the decision of the engineer should be final on the question of the right to an extension of time. The language used in that contract is strikingly similar to that used in the case at bar.

The contract in the Gleason case provided:

> "If, in any event, the party of the second part (the contractor) shall delay or fail to commence * * * the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the

> work * * * then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract. * * * provided, however, that if the party or parties of the second part shall, by freshets, ice, or other force or violence of the elements, * * * be prevented from commencing or completing the work * * * at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable."

The Court in its opinion as to the effect to be given to this provision of the contract makes the following quotation from the case of Kihlberg *v.* United States, 97 U. S. 398; 24 L. Ed. 1106.

> "'Be this supposition as it may, it is sufficient that the parties expressly agreed that distances should be ascertained and fixed by the Chief Quartermaster, and in the absence of fraud * * * his action in the premises is conclusive upon the appellant as well as upon the Government.'"

After making this quotation, the Court, in referring to the engineer, says:

> "As, then, his granting of additional time would be final and irrevocable, so his refusal to allow it was necessarily final."

The Court further says, in referring to the contractors:

> "But as they had agreed, in the contract as we have construed it, that the engineer was to decide whether the failure to complete was due to the force of the elements or to their own fault, their allegation now is that the determination of the engineer was wrongful and unjust because he de-

> cided the submitted issue against them. Of course, such an allegation was wholly insufficient on which to base an attempt to upset the judgment of the engineer."

In the case of Barlow *v.* U. S. (35 Ct. Cls. 514), finally decided in this Court (184 U. S. 123), the contract provided that stone to be furnished by the contractor should be "sandstone of quality approved by the engineer," and that all materials should be "of the best kind and quality adapted for the work." The contract further provided that any disputes as to the meaning or requirements of anything in the contract should be referred to and decided by the Chief of the Bureau of Yards and Docks, with right of appeal to the Secretary of the Navy, and that the parties would abide by his decision.

Certain stone furnished by the claimants was approved by the engineer in charge, but its use was disapproved of and payment therefor refused by the Chief of the Bureau of Yards and Docks, whose action was approved by the Secretary of the Navy.

The Chief of Engineers in the case at bar, like the Secretary of the Navy in the Barlow case (*supra*), *had no personal knowledge of the work in question, and was therefore not in a position to decide this question as was the engineer in charge.* In considering this phase of the case the Court in the Barlow case said:

> "The architect or engineer in charge being the person most familiar with the work, and professionally fitted to pass upon such questions, is ordinarily designated as the referee or arbitrator to determine them. Such agreements for such arbitraments must be upheld. But the agreement now under consideration is a very different thing. It goes far beyond anything that has come before the

> Court since the case of Douglas, for it sets up the Secretary of the Navy, having no personal knowledge of the matter in dispute, as being in effect an appellate court of justice—the court of last resort."

Proceeding further in its opinion the Court says:

> "The Court does not intend to pass upon the issue whether the one stone was better than the other, or whether either or both were sufficient for the uses and purposes to which the stone might be put. It is incontrovertible that either the engineer in charge or the Chief of the Bureau was the person to determine this question, and the resulting question as to which was the proper person is one of law. In the absence of fraud, collusion, or gross mistake the decision of the proper arbitrator was final and conlusive. There is no fraud or collusion in the case, and the Court is entirely satisfied that the engineer in charge acted with due care and caution, and that his decision was the exercise of his best judgment."

The Court thereupon rendered judgment in favor of the claimants on the theory that the approval of the stone by the engineer in charge was binding upon the Government, *and that the provision in the contract giving the Chief of the Bureau of Yards and Docks and the Secretary of the Navy the right to decide disputes did not give either of these officials the power to reveiw the action of the engineer in charge.*

The case was then appealed to the Supreme Court of the United States, and the decision of the Court of Claims to the extent of allowing recovery for the stone which had been actually delivered was affirmed. In its opinion the Supreme Court used the following language:

> "We think, indeed, that the engineer in charge of the work was the appointee of the parties, and

> that his decision upon the quality of sandstone was final when properly exercised, but it could not be exercised in advance of the work and forestall his judgment of stone furnished or about to be used. * * * " (U. S. *v.* Barlow 184 U. S., 123; 46 L. ed. 463).

The above language is very forcibly applicable to the case at bar. Here we have an engineer officer in charge of the work, who prepared the specifications, and inserted therein a provision making the engineer in charge, who happened to be himself, the final judge of their meaning, who prepared the contract and provided therein that he should exercise his judgment in determining the right of the contractor to time extensions, familiarized himself with the work, and then determined that certain conditions entitled the contractor to an extension of time, but the Chief of Engineers, sitting in his office at Washington, with no personal knowledge of the work, says that the engineer in charge is wrong in his interpretation of the specifications which he himself had drawn, and that his judgment as to the contractor's right to an extension of time thereunder is erroneous.

If there is any distinction to be drawn between this case and the Barlow case it must be resolved in favor of this case, for the reason that in the Barlow case the contract clearly expressed the intention of the parties to make the Secretary of the Navy a final arbitrator, while here the only words upon which the Government can rely for such a construction are found in the expression "with the prior *sanction* of the Chief of Engineers."

It might be added that, whether the duty of the Chief of Engineers was a discretionary or a ministerial one, his action in refusing to grant the time extension recommended by the engineer in charge, Capt. Brown, and his

subordinate, Lieut. Patterson, under the circumstances clearly implied bad faith, and the Court should hold that Capt. Brown's recommendation should have been adopted and an extension of time granted.

In the case of Chicago, Santa Fe & California Railroad Co. *v.* Price, *et al.* (138 U. S. 187), it was held that where the amount of work by contractors in building a railroad was to be measured and ascertained by the Chief Engineer of the road, whose decision was to be final, such decision was binding and conclusive upon the parties, unless there was fraud on the part of the engineer or such gross mistake by him as to imply bad faith, and that subsequent *re-estimates were not binding upon the* contractor.

Applying the principle of that case to the case a bar, it follows that when Capt. Brown, the engineer in charge, once reached the conclusion that the encountering of the submerged forest entitled appellant to an extension of time, his decision was binding upon the Government and he could not thereafter decide this identical question otherwise. His action, therefore, in accordance with the direction of the Chief of Engineers, in withholding appellant's money, as so-called liquidated damages, was in derogation of appellant's vested rights, illegal and of no binding effect.

6.

CONSTRUCTION GIVEN BY PARTIES TO THE CONTRACT SHOULD CONTROL.

In considering these provisions of the contract the Court should also consider the construction which the parties themselves placed upon it, for the rule is elemen-

tary that the construction which the parties themselves have placed upon a contract should control.

D. C. *v.* Gallaher (124 U. S. 505, 31 L. Ed. 526).
Garrison *v.* U. S. (7 Wall. 688, 19 L. Ed. 277).
Gibbons *v.* U. S. (109 U. S. 200, 27 L. Ed. 906).

In the case first cited it was held that the construction placed upon the contract by the parties will control even if it is at variance with the literal meaning.

Here we have a contract the literal meaning of which cannot be that for which the Government contends. Its literal meaning is that the encountering of such an unforeseeable condition as the submerged forest in question should entitle the contractor to an extension of time, and if there is any doubt as to its meaning, this doubt is easily removed by adopting the construction which was placed upon it by the parties themselves, particularly the officer, Capt. Earl I. Brown, as the first party, acting for appellee, who prepared and signed it, and had charge of its execution.

It is accordingly submitted that the Court has erred in holding that the contract did not contemplate an extension of time if the contractor encountered such an obstruction as the submerged forest here in question.

It is earnestly contended by appellant that this should be done, not only on the above grounds, but also upon the ground that the so-called liquidated damages in fact constituted an imposition of a penalty, as hereinafter shown, for which appellant is entitled to judgment.

II.

THE FIRST PARAGRAPH OF ARTICLE V OF THE CONTRACT CONTEMPLATED A PENALTY AND NOT LIQUIDATED DAMAGES.

The first paragraph of Article V of the contract reads as follows: (R. 22)

> "It is further expressly understood and agreed that time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part to complete this contract within the time as specified and agreed upon that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance, and they are hereby agreed upon, liquidated, and fixed at the sum of twenty (20) dollars for each division for each and every day the party of the second part shall delay in the completion of this contract, and the party of the second part hereby agrees to pay to the United States as liquidated damages, and not by way of penalty, the sum of twenty (20) dollars for each division for each and every day the party of the second part shall delay in the completion of this contract, said delay not being the fault of the party of the first part."

Under this paragraph the Government deducted as so-called liquidated damages the sum of $7,320, this being in addition to the sum of $210.50 which it withheld as the costs of superintendence and inspection under the second paragraph of this article of the contract.

Paragraph X of the Amended Petition (R. 12) avers that the canal excavated under the contract was but a

very small part of a proposed continuous line of inland waterways, extending from Key West, Florida, to Maine; that at the time the contract was entered into no additional work on said continuous line of waterways was provided for or seriously contemplated within the time said contract was actually completed by appellant; that the construction of no contiguous part thereof has since been contracted for or undertaken by the Government; that it was well known by the Government at the time of the signing of the said contract that the canal to be excavated thereunder could not be used to any practical extent for commercial purposes until the completion of the other portions of said inland waterways; that said canal has never been used to any practical extent for commercial purposes; and that the delay, therefore, in the completion of said canal has caused the Government no actual damage beyond the costs of superintendence and inspection. In short, this paragraph of the amended petitior avers that the delay in the completion of the contract in question caused the Government no damage and that it was known to the Government officials at the time of the signing of the contract that the non-completion of the work before the time of its actual completion would cause the Government no damage.

The truth of these averments being admitted by the demurrer, it remains to consider the question whether the withholding of the sum of $7,320, in addition to the amount of actual damage, to wit, $210.50 (the costs of superintendence and inspection), operates as the infliction of a penalty or constitutes liquidated damages.

1.

DISTINCTION BETWEEN LIQUIDATED DAMAGES AND PENALTY.

It has been repeatedly held that a sum stipulated to be paid as liquidated damages on the breach of an agreement, where no actual damage resulted therefrom, constituted a penalty, although there was no ambiguity or obscurity in the words or language employed.

The law governing the distinction between liquidated damages and penalty is well stated in Sedgwick on Damages, 9th edition, Vol. I, p. 779, in the following language:

> "The great object of this system is to place the plaintiff in as good a position as he would have had if his contract had not been broken. So long as parties thus keep this principle in view they will be allowed to agree upon such a sum as will probably be a fair equivalent of a breach of contract. But when they go beyond this and undertake to stipulate, not for compensation, but for a sum out of proportion to the measure of liability which the law regards as compensatory, then the law will not allow the agreement to stand. In all agreements therefore fixing upon a sum in advance as the measure or limit of liability, the final question is whether the subject of the contract is such that it violates this fundamental rule of compensation. If it does, the sum fixed is necessarily a penalty."

Continuing, on page 781, this author says:

> "Some courts say that the damages must not be 'grossly excessive,' some that they must not be 'unjust and oppressive,' 'unreasonable,' 'extravagant,' or 'disproportionate,' but all seem to agree upon the principle that the stipulated sum will not be allowed as liquidated damages unless it may fairly be allowed as compensation for the breach."

Further, on page 789, is the following:

> "Whenever the stipulated sum is obviously greater than the damage could be it will not be allowed as liquidated damages. * * * On this account it has been held that *where only nominal damages are suffered* by a breach of contract *no liquidated damages will be allowed.*" (Italics ours.)

The principle for which appellant here contends is in harmony with the opinions of the Supreme Court in the following cases:

In the case of Tayloe *v.* Sandiford (7 Wheaton, 13, 5 L. Ed. 384), it was held that a provision in a contract requiring the completion of a house on a certain date, in default of which the contractor was to pay the owner a specified sum, constituted a penalty.

In the case of VanBuren *v.* Digges (11 Howard 461, 13 L. Ed. 771), the contract provided that a house should be finished by a certain date, upon failure of which the contractor should forfeit ten per cent of the contract price. This provision was construed as a penalty.

We do not understand that we are concluded in this case by the decision of this Court in the case of Sun Printing and Publishing Association *v.* Moore (183 U. S. 642, 46 L. Ed. 366); and the United States *v.* Bethlehem Steel Company (205 U. S. 105, 51 L. Ed. 731), the two principal decisions of this Court on the question of liquidated damages.

Neither of these cases went so far as to hold that the parties might provide for actual damages, as was done in this case (the costs of superintendence and inspection being provided for independently of the stipulation for liqui-

dated damages) and in addition stipulate for the sum to be paid "as and for liquidated damages" when no other damages than the actual damages, namely, costs for superintendence and inspection, which were provided for, could arise.

We wish to emphasize the fact that in the present case so-called liquidated damages, exclusive of the costs of superintendence and inspection, were stipulated for in one paragraph of Section V (R. 22) and in another paragraph of the same section it was distinctly stipulated that in addition to the so-called liquidated damages, "the United States shall also have the right to recover from the party of the second part all costs of inspection and superintendence incurred by the United States during the period of delay."

In the Sun Printing and Publishing Association case this Court said "that the intention of the parties is to be arrived at by the proper construction of the agreement made between them," and at no place was it intimated by the Court that where it is apparent from the contract itself, taken in connection with the established facts known to both parties at the time the contract was signed, that the stipulation for liquidated damages was in fact a penalty, the Court would sustain the stipulation.

As stated in paragraph XI of the amended petition (R. 12) neither of the two divisions of the canal was nor could be used for any purpose until the completion of the other division thereof, and the loss, therefore, if any, which the Government sustained, in addition to the costs of superintendence and inspection, by the delay in the completion of the canal was no greater per day before Division A was completed than the loss per day, if any, after that time. Notwithstanding this fact, the Govern-

ment deducted $40.00 per day as so-called liquidated damages for the period of delay previous to the completion of Division A and only $20.00 per day for the subsequent delay.

Surely it cannot be successfully contended that, where the government's loss, if any, has been the same each day, deductions at a certain rate per day for a part of the period of delay and at only half that rate for the other portion of such period tend to support the proposition that these deductions constituted liquidated damages. The fact that the deductions per day varied while the actual damage, if any, was no greater on one day than on another, leaves no room for doubt or argument that these deductions were purely arbitrary and could not and did not represent any measure of damages. They constituted nothing but a penalty.

The court further said in the Sun Printing and Publishing Association case (p. 673):

> "In the case at bar, aside from the agreement of the parties, the damage which might be sustained by a breach of the covenant to surrender the vessel was uncertain, and the unambiguous intent of the parties was to ascertain and fix the amount of such damage. In effect, however, the effort of the petitioner on the trial was to nullify the stipulation in question by mere proof, not that the parties did not intend to fix the value of the yacht for all purposes, but that it was improvident and unwise for its agent to make such an agreement. Substantially the petitioner claimed a greater right than it would have had if it had made application to a court of equity for relief, for it tendered in its answer no issue concerning a disproportion between the agreed and actual value, averred no fraud, surprise, or mistake, and stated no facts claimed to warrant a reformation of the agreement. Its alleged right to have eliminated from the agreement the clause

> in question, for that is precisely the logical result of the contention, was asserted for the first time at the trial by an offer of evidence on the subject of damages."

In other words, it was admitted by the petition in the above case that there was some damage and in the pleadings no issue was raised as to a "disproportion between the agreed and actual value." But for this admission in the petition it is evident from the language of the Court that if the question had been properly raised and it had been established that there was a material disproportion between the agreed and actual damage, the question might have been determined differently.

In the case at bar it is alleged, and admitted by the demurrer to be true, that no damage whatever was sustained under the liquidated damage clause of the contract, and it is also alleged and admitted that the sum of $7,320.00 has been retained under this liquidated damage clause.

In the case of United States against Bethlehem Steel Company, *supra* (205 U. S. 105, 51 L. ed. 731), the language used by the court in its decision clearly distinguishes that case from the case at bar. It will be recalled that in the Bethlehem Steel Company case it was sought to recover from the United States the sum deducted, as liquidated damages, from the contract price for delay in delivery, of certain disappearing gun carriages which were contracted to be delivered at an especially early date on account of the war with Spain. Referring to the facts in that case and the results of a decision to the affect that the sum so withheld was a penalty and not by way of liquidated damages, the court said:

> "The correspondence shows that the sum was arrived at by figuring the average difference in time of delivery between the price bid for slow delivery of

the carriages and the price under the accepted bid, the Department saying 'that this average difference should be the prescribed penalty.'"

* * * * * * * *

"*The amount is not so extraordinarily disproportionate to the damage which might result from the failure to deliver the carriages as to show that the parties must have intended a penalty*, and could not have meant liquidated damages. If the contract were construed as contended for by the company, it would receive (as events have turned out) the highest price for the longest time in which to deliver, which could not have been contemplated by either party." (Italics ours.)

CONCLUSION.

From the foregoing we respectfully submit that the decision of the Court of Claims sustaining the demurrer of the appellee to the appellant's amended petition was erroneous and should be reversed.

Respectfully submitted,

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D. B. HENDERSON,
J. BARRETT CARTER,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE MARYLAND DREDGING AND CONTRACTING COMPANY (Inc.), appellant,
v.
THE UNITED STATES.
} No. 310.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment dismissing the petition on the demurrer of the Government.

Appellant agreed to construct a channel from Beaufort Inlet to Pamlico Sound, North Carolina, through Adams and Core Creeks, and through the intervening dry land between the heads of these creeks. The work was commenced 45 days after the date of the approval of the contract by the Chief of Engineers, on September 14, 1908, and was to be completed on March 14, 1910. It was not completed until November 15, 1910. At the time of final settlement the Government retained the sum of $7,320 as liquidated damages for delays, and

$210.50 as cost of superintendence and inspection during the period of delay. The following paragraphs of the contract are pertinent (Rec. 2–4):

> It is further expressly understood and agreed that time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part to complete this contract within the time as specified and agreed upon that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible, of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance, and they are hereby agreed upon, liquidated, and fixed at the sum of twenty dollars ($20) for each division for each and every day the party of the second part shall delay in the completion of this contract, and the party of the second part hereby agrees to pay to the United States as liquidated damages, and not by way of penalty, the sum of twenty dollars ($20) for each division for each and every day the party of the second part shall delay in the completion of this contract, said delay not being the fault of the party of the first part.
>
> It is further understood and agreed that the United States shall also have the right to recover from the party of the second part all costs of inspection and superintendence incurred by the United States during the period of delay, and also a reasonable value of any labor and materials which may be furnished

by the party of the first part to the party of the second part during the time the latter is proceeding under this contract. And the party of the first part may deduct or retain all of the above-mentioned sums out of or from any money or reserved percentage that may be due or become due the party of the second part under this agreement.

Provided, however, That if the party of the second part shall by strikes, epidemics, local or State quarantine restrictions, *or by abnormal force or violence of the elements*, be actually prevented from completing the work or delivering the materials at the time agreed upon in this contract, and such delay is without contributory negligence on his or their part, such additional time may, with the prior sanction of the Chief of Engineers, be allowed him or them, in writing, for such completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance or extension shall in no manner affect the rights or obligations of the parties under this contract, but the same sha'l subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon. * * *

16. The time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience, *unless extraordinary and unforeseeable conditions supervene.* * * * [Italics ours.]

22. *Character of material.*—The material is believed to be soft mud, sand, clay, shell, and silt. Each bidder, however, is expected to examine and decide for himself, as no allowance will be made should any of it prove to be otherwise than as stated, except that solid rock, large bowlders, and compact gravel will not have to be removed at the prices bid for ordinary excavation. If such materials should be encountered their removal, if required by the engineer, will be done under special agreement and paid for as extra work, as provided for in the form of contract to be entered into. * * *

24. *Clearing.*—All trees growing in the area to be excavated and within 25 feet of the banks of the excavation will be removed by the contractor. The contractor shall have the right to use timber so cut in such accessory works as he may deem desirable. *The channel must be cleared of all snags, logs, roots, stumps, or wreckage that project into or encroach in any way upon the cross section,* as indicated in paragraph 27, the cost of same being included in the unit price bid for excavation. * * * [Italics ours.]

27. *Excavation.—Dredges,* or other appliances will work on lines and in positions laid out by the engineer. Care must be taken to leave a reasonably even bottom at the depth required and a close approximation to the required side slopes. The contractor will be required to go over his work, if necessary, to produce this result.

Appellant contends that during the performance of the work it encountered a "submerged forest," which caused the delay in completing the contract; that this obstruction was due to "abnormal force and violence of the elements" and was "extraordinary and unforeseeable," and therefore such as to excuse the delay for which liquidated damages have been withheld. (Rec. 2 and 3, brief 11.)

The Government maintains that the "submerged forest" does not come within the classification of extraordinary and unforeseeable conditions caused by an abnormal force and violence of the elements and such as would excuse the delay of appellant; that the Government was in no way responsible; and that appellant, having made its own examination and not exempted itself by the terms of the contract, was responsible.

ARGUMENT.

The "submerged forest" was not a condition which would excuse appellant from the terms of the contract for delay caused thereby.

The only question in this case is whether the encountering of a "submerged forest" which appellant so picturesquely describes, and which it is alleged caused the delay that ensued herein, can relieve appellant from the effect of the liquidated-damage clause. Under paragraph V of the contract the obstruction is not comprehended by the phrase "strikes, epidemics, local or State quarantine restrictions, or by abnormal force or violence of the elements." * * * (Rec. 2.)

The phrase "abnormal force or violence of the elements" presupposes an action of nature happening subsequent to the signing of the contract. This is borne out by the language found in section 16 (Rec. 3), wherein it says that "unless extraordinary and unforeseeable conditions *supervene*," the time allowed by the contract is deemed sufficient. The word "*supervene*" indicates conditions happening after the signing of the contract. Webster's Dictionary interprets "supervene" synonymously with "follow;" "to be added or to follow closely."

In this case the "forest" was "submerged" before the contract was signed. It may have been submerged ten or a thousand years before. The petition does not throw any light upon this, nor does it show that it was submerged by an "abnormal force or violence," although the pleader alleges this as its own conclusion.

Furthermore this court has held repeatedly that unforeseen difficulties, however great, will not excuse failure to perform a contract. In the case of the *Carnegie Steel Company* v. *The United States*, decided February 21, 1916, it is stated that "unforeseen difficulties, however great, will not excuse performance of a contract unless they have been guarded against by a proper stipulation."

Dermott v. *Jones* (2 Wall. 1, 7, 8).

Sun Printing and Publishing Assn. v. *Moore* (183 U. S. 642).

The Harriman (Admiralty) (9 Wall. 161).

Section VII (Rec. 15) warned appellant "to estimate correctly the difficulties attending the execution of the work."

Section XXII (Rec. 18) required each bidder "to examine and decide for himself" the character of the material to be excavated.

Section 24 (Rec. 18) states: "The channel must be cleared of all snags, logs, roots, stumps, or wreckage that project into or encroach in any way upon the cross section." * * *

Section XXIX (Rec. 19) made known the necessity for a "dredge, or snagboat."

In view of the foregoing and the fact that it is not claimed that an "abnormal violence" occurred after the signing of the contract, it is maintained that the alleged obstruction was not such as would excuse the delay.

Appellant claims (Par. VIII, Rec. 10) that it made an "exhaustive examination and inspection of the proposed work * * * at the time of the submission of the said bid and the execution of the said contract." It also asserts that the "submerged forest" was unknown to any person. It is apparent, therefore, that appellant did not rely upon representations of the Government, nor was it pleaded that the Government was in any way responsible. The contrary is conceded by the contractor. (Brief, p. 12.)

Appellant argues (brief, 36) that "The first paragraph of Article V of the contract contemplated a penalty and not liquidated damages." It was

agreed, however, between the parties that time should be of the essence of the contract; that in the event of failure to complete performance within a specified time the Government would be damaged thereby an amount "difficult, if not impossible, of definite ascertainment and proof," and that the amount of damages should therefore be estimated and agreed upon in advance. (Art. V, Rec. 22.)

The case of the *United States* v. *The Bethlehem Steel Company* (205 U. S., 105, 119) is conclusive of the right of the Government to charge liquidated damages without a showing of actual damages in the premises.

There are a number of other points raised in appellant's brief to which the Government will not reply.

It is respectfully submitted that the judgment of the lower court should be affirmed.

HUSTON THOMPSON,
Assistant Attorney General.

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MARYLAND DREDGING AND CONTRACTING COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 310. Argued April 25, 1916.—Decided May 8, 1916.

A government contract for dredging a channel contained a provision that time was an essential feature, and provided for a specified amount per day as liquidated damages for delay and not as a penalty; it also provided that unless extraordinary and unforeseen conditions should supervene the time allowed was sufficient and extensions could only be granted on recommendation of engineer in charge affirmed by Chief of Engineers; a submerged forest which had not been discovered by the contractor prior to commencement of the work, although the contract placed the burden on him to do so, was encountered and so impeded progress as to cause delay for which the Government deducted as liquidated damages the amount specified in the contract. In a suit to recover that amount *held:*

The provision in the contract that the time was sufficient unless extraordinary conditions should supervene does not amount to a promise for extension if such conditions do supervene.

The extent of promise for an extension under the contract was confined to what the engineer in charge would grant with the sanction of the Chief Engineer; nor was the Chief Engineer bound, in the absence of fraud, to give his sanction to a recommendation of the engineer in charge for an extension.

For extraordinary conditions to supervene in such a case they must come into being after commencement of the work, and not merely be thereafter discovered to have existed and still to exist.

The provision in the contract for liquidation of damages at $20 per day contains no element of deception or exorbitance and the contractor cannot escape the terms agreed upon.

THE facts, which involve the construction of a contract with the United States for excavation of a channel, and the liability of the contractor for damages for delay in completion, are stated in the opinion.

Mr. C. C. Calhoun, with whom *Mr. D. B. Henderson* and *Mr. J. Barrett Carter* were on the brief, for appellant:

The submerged forest encountered as it was entitled appellant to an extension of time. Appellant is also entitled to such extension under paragraph 16 of the specifications, and Article V of the contract. Provisions of contract and specifications relieving contractor from performance are equivalent to the phrase "Act of God" as defined in 1 Cyc. 758, and Words and Phrases, 118. There is no inconsistency between paragraph 16 of the specifications and Article V of contract. The construction given by arbitrator named in contract should govern. The sanction of the Chief Engineer is a ministerial and not a judicial act. The construction given by parties to the contract should control.

The first paragraph of Article V of the contract contemplated a penalty and not liquidated damages. There is a distinction between liquidated damages and penalty.

In support of these contentions see *Barlow* v. *United States*, 35 Ct. Cls. 514; *S. C.*, 184 U. S. 123; *Chicago & Santa Fe R. R.* v. *Price*, 138 U. S. 187; *Dist. of Col.* v. *Gallaher*, 124 U. S. 505; *Garrison* v. *United States*, 7 Wall. 688; *Gibbons* v. *United States*, 109 U. S. 200; *Kihlberg* v. *United States*, 97 U. S. 398; *New Jersey Foundry* v. *United States*, 44 Ct. Cls. 570; 1 Sedgwick on Damages, 9th Ed., p. 779; *Stewart* v. *Stone*, 14 L. R. A. 215, note; *Sun Printing Assn.* v. *Moore*, 183 U. S. 642; *Tayloe* v. *Sandiford*, 7 Wheat. 13; *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105; *United States* v. *Gleason*, 175 U. S. 589; *Van Buren* v. *Digges*, 11 How. 461; *Williams* v. *Grant*, 1 Connecticut, 487.

Mr. Assistant Attorney General Huston Thompson for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims dismissing the claimant's petition upon demurrer. On August 15, 1908, the claimant made a contract with Captain Brown of the Engineers, acting for the United States, to excavate a channel from Beaufort Inlet to Pamlico Sound through Core and Adams Creeks in conformity with specifications made part of the contract. It was approved on September 10 and required the work to be begun within forty-five days after date of notification of approval, September 14, and to be completed within eighteen months. The work not having been finished on time $7,320 of the agreed compensation was withheld as liquidated damages and $210.50 as additional costs of superintendence and inspection, $7,530.50 in all, for which sum this suit is brought.

The petition alleges that after getting through Core Creek to and through the headwaters of Adams Creek to a point on tide water about five miles from its mouth, where for a mile and a half it averages more than 1200 feet wide and for the next three miles and a half 2500 feet, the stumps and roots of a submerged forest were encountered at about eight feet below the bottom of the water, which made it impossible to do the work with the ordinary machinery and in the ordinary way, or to finish the work by the time agreed. It is alleged that the forest was submerged by some abnormal force and violence of the elements, and that it could not have been discovered by the ordinary methods of inspection and was not discovered in fact, although the claimant and others and the Government had exercised every known precaution and had made exhaustive examinations with the utmost care and skill. The petition sets up that this was a prevention 'by abnormal force and violence of the elements' within

the contract and that the claimant also was entitled to an allowance of time under a clause in the specifications stating that the time is considered sufficient 'unless extraordinary and unforeseeable conditions supervene.' It also sets up that an extension of time was recommended by Captain Brown although disallowed by the Chief Engineer. Finally the petition alleges that it was known by the Government officials when the contract was made that the portion of the canal excavated by the claimant could not be used to any practical extent for commercial purposes until adjoining portions of a proposed line were completed and that the additional work was not provided for or seriously contemplated within the time of the claimant's work. It is concluded that although the contract purports to provide for liquidated damages fixed at $20 a day, yet in the circumstances it really imposed a penalty and that the Government has no right to retain the sum.

As has been implied already the contract agreed "that time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part to complete this contract within the time as specified and agreed upon that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance, and they are hereby agreed upon, liquidated, and fixed at the sum of twenty (20) dollars for each division for each and every day the party of the second part shall delay in the completion of this contract" and the claimant agrees to pay that amount 'as liquidated damages, and not by way of penalty.' It is agreed further that the United States shall have the right to recover all costs of inspection and superintendence incurred by it during the period of delay, and that it may

retain all the above-mentioned sums from any moneys falling due under the contract.

There is a proviso that if the claimants 'shall by strikes, epidemics, local or state quarantine restrictions, or by the abnormal force or violence of the elements, be actually prevented from completing the work . . . at the time agreed upon' without contributory negligence on his part 'such additional time may, with the prior sanction of the Chief of Engineers, be allowed him' . . . 'as, in the judgment of the party of the first part, or his successor, shall be just and reasonable.' As we have intimated, the specifications also state that the time allowed is considered sufficient 'unless extraordinary and unforeseeable conditions supervene.' The claimant further thinks that he finds some support for his argument in a provision that 'solid rock, large bowlders, and compact gravel will not have to be removed at the prices bid for ordinary excavation. If such materials should be encountered their removal, if required by the engineer, will be done under special agreement and paid for as extra work.' On the other hand the claimant was required to remove all trees and "The channel must be cleared of all snags, logs, roots, stumps, or wreckage that project into or encroach in any way upon the cross section, . . . the cost of same being included in the unit price bid for excavation." The claimant invokes a provision that the engineer's decision as to quality, quantity and interpretation of the specifications shall be final; and this ends the statement of his case.

It is hopeless to argue against the provisions that we have recited, and the further express warning that each bidder 'is expected to examine and decide for himself, as no allowance will be made should any of it prove to be otherwise than as stated,' except as above recited with regard to solid rock, &c. It is suggested that the special agreement to be made for the removal of 'such materials'

means materials of similar kind; but the phrase cannot be stretched to cover roots. The statement in the specifications that the time is sufficient unless extraordinary conditions supervene does not promise an extension if such conditions do supervene. The extent of this promise is found in the words of the contract providing for the allowance of such additional time as with the sanction of the Chief Engineer the engineer in charge may think reasonable. Those words tend also to support the contention of the Government that 'supervene' means come into being in the course of the work, as in the case of strikes, epidemics, &c., and not merely be discovered to have existed and still to exist. We may add that the averment hazarded that the submergence of the forest was due to abnormal force of the elements is too obvious an attempt to pervert the meaning of the proviso as to being actually prevented by such force from completing the work, to require analysis. But it is enough to say that any extension depended on the sanction of the Chief of Engineers and that that sanction was denied. It is said that the engineer in charge construed the contract differently as he recommended an allowance of time. But the ground of the recommendation does not appear to have been an incorrect interpretation of the contract, on the contrary it is alleged that the liquidated damages were withheld by Captain Brown; and if his interpretation had been wrong, it is hard to see how it would have bound his superior on whose sanction the recommendation depended for effect. The suggestion that it was the duty of the Chief Engineer to give his sanction in the absence of fraud finds no support in the words used. The claimant must abide by the words. *Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 164.

The allegations by which the claimant attempts to avoid his contract making time of the essence, that the damages were difficult to prove and that therefore they should be fixed at twenty dollars a day, are too specula-

tive to do more than emphasize the necessity for the liquidation. There is no element of deception or exorbitance and although the case seems a hard one we see no ground upon which the claimant can escape from the terms to which he has agreed. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119.

Judgment affirmed.